IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-420

CAESAR'S HEALTH CLUB, et al.,
Petitioners,

v.

ST. LOUIS COUNTY, MISSOURI.

PETITION FOR A WRIT OF CERTIORARI

To the Missouri Court of Appeals, St. Louis District

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Caesar's Health Club, et al., your petitioners, respectfully pray that a writ of certiorari be issued to review the judgment of the Missouri Court of Appeals, St. Louis District, entered in the above-entitled cause on the 21st day of June, 1978.

OPINIONS BELOW

On August 19, 1975, petitioners, twelve corporations or proprietorships conducting business in St. Louis County, Missouri, as massage parlors, filed a petition in the Circuit Court of St. Louis County, Missouri, for declaratory judgment and

for interlocutory and permanent injunctive relief against the application and enforcement of St. Louis County Ordinance No. 7546. The ordinance defines prostitution and prescribes criminal penalties therefor. On July 23, 1976, the Circuit Court declared St. Louis County Ordinance No. 7546 to be constitutional, lawful and valid. A copy of the ordinance is reproduced in Appendix A.

Petitioners duly appealed to the Missouri Court of Appeals, St. Louis District. In an opinion filed April 11, 1978, the judgment of the trial court was affirmed. The opinion of the Missouri Court of Appeals, St. Louis District, has been officially reported and can be found at 565 S.W.2d 783 (1978). A copy of the opinion is reproduced in Appendix B.

Various motions for rehearing and transfer were filed and overruled by the Missouri Court of Appeals, St. Louis District. Thereafter, petitioners duly filed an application for transfer to the Supreme Court of Missouri. On June 15, 1978, the Supreme Court of Missouri denied petitioners' application to transfer the cause from the Missouri Court of Appeals, St. Louis District, to the Supreme Court of Missouri. A copy of the order of the Supreme Court of Missouri denying petitioners' application for transfer is reproduced in Appendix C.

On June 21, 1978, the mandate of the Missouri Court of Appeals, St. Louis District, was received and entered into the record of St. Louis County, Missouri. By an order of that Court dated June 29, 1978, a temporary restraining order previously entered was continued in full force and effect pending application to the United States Supreme Court for a Writ of Certiorari. Enforcement of St. Louis County Ordinance No. 7546 is thereby stayed pending a determination by this Honorable Court of this petition for a writ of certiorari.

JURISDICTION

The opinion of the Missouri Court of Appeals, St. Louis District, was filed on April 11, 1978. The Supreme Court of Missouri denied discretionary transfer on June 15, 1978.

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I

Whether the trial court's failure to require, and the respondent's failure to show a compelling state interest to justify the challenged ordinance deprives petitioners of rights guaranteed them under the Constitution of the United States.

II

Whether the challenged ordinance violates fundamental rights of privacy afforded petitioners by the Constitution of the United States.

III

Whether the challenged ordinance violates petitioners' rights to Due Process of Law as guaranteed by the Constitution of the United States by reason of its overbreadth.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT INVOLVED

Amendments to Constitution of the United States:

I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

V

. . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .

IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes of State of Missouri

§ 563.230. **The abominable and detestable crime against nature—penalty**

Every person who shall be convicted of the detestable and abominable crime against nature, committed with mankind or with beast, with the sexual organs or with the mouth, shall be punished by imprisonment in the penitentiary not less than two years.

Ordinances of St. Louis County, Missouri

Bill No. 178, Ordinance No. 7546

Section 1. Sections 713.030, 713.040, 713.050 and 713.080 SLCRO 1964, as amended, are hereby repealed.

Section 2. Title VII, Chapter 713, SLCRO 1964, as amended, the Vice and Morality Code, is hereby amended by enacting and adding thereto three new sections, to be numbered 713.-030, 713.040 and 713.080, relating to the regulation of prostitution, which new sections shall read as follows:

713.030 **Definitions** 1. The term "person" as used in this Chapter shall mean any natural person, firm, partnership,

co-partnership, association, corporation or organization of any kind.

2. A person commits "prostitution" if he or she engages or offers or agrees to engage in sexual conduct in return for something of value to be received by the person or a third person.

3. "Sexual Conduct" occurs when there is:

(a) "Sexual Intercourse" which occurs when there is any penetration of the female sex organ by the male sex organ;

(b) "Deviate Sexual Intercourse" which means any sexual act involving the genitals of one person and the mouth, tongue or anus of another person;

(c) "Sexual contact" which means any touching, manual or otherwise, of the anus or genitals of one person by another.

4. "Something of Value" means any money or property, or any token, object or article exchangeable for money or property.

5. "Promoting prostitution" occurs when a person knowingly promotes, solicits, compels, or encourages a person to engage in prostitution or patronize prostitution.

6. "Profiteering from Prostitution" occurs when a person, acting other than as a prostitute receiving compensation for personally rendered prostitution services, knowingly accepts money or receives money or other property pursuant to an agreement or understanding with any person whereby he or she participates or is to participate in the proceeds of prostitution activity.

713.040 **Prostitution, Promoting Prostitution, Profiting from Prostitution—Prohibited.**—A person shall not engage in prostitution, promoting prostitution, or profiting from prostitution.

713.080 **Penalties**—Any person violating any of the provisions of this Chapter shall upon conviction be punished by a fine not exceeding One Thousand Dollars ($1,000.00) or by imprisonment in the County Jail for not exceeding one (1) year, or by both such fine and imprisonment.

STATEMENT

On August 19, 1975, petitioners, being twelve corporations or proprietorships, all duly authorized and conducting business in St. Louis County, Missouri, filed a petition for declaratory judgment and for interlocutory and permanent injunctive relief against the application and enforcement of St. Louis County Ordinance No. 7546.

All petitioners conduct the business of a massage parlor, involving on occasion the touching, manually or otherwise, by employees of petitioners of the anus or genitals of another in exchange for something of value.

A Temporary Restraining Order and an Order to Show Cause were issued by the Honorable George W. Cloyd, Judge, Division Nine of the St. Louis County Circuit Court on August 19, 1975, and the latter was made returnable on October 14, 1975. On July 23, 1976, the challenged Ordinance was declared "to be constitutional, lawful and valid", the "(t)emporary restraining order dissolved" and the "(p)ermanent injunction denied". On July 26, 1976, the Honorable William H. Crandall, Jr., Judge, Division One of the St. Louis County Circuit Court, "in the absence of and at the request of Judge George W. Cloyd" granted further injunctive relief against the application and enforcement of the challenged legislation pending appeal.

Petitioners' motion for new trial was filed on August 6, 1976, and the same was overruled on September 24, 1976. Notice of Appeal and Jurisdictional Statement were duly filed by petitioners on October 1, 1976.

Petitioners duly appealed to the Missouri Court of Appeals, St. Louis District. In an opinion filed April 11, 1978, the judgment of the trial court was affirmed.

Various motions for rehearing and transfer were filed and overruled by the Missouri Court of Appeals, St. Louis District. Thereafter petitioners duly filed an application for transfer to the Supreme Court of Missouri. On June 15, 1978, the Supreme Court of Missouri denied petitioners' application to transfer the cause from the Missouri Court of Appeals, St. Louis District, to the Supreme Court of Missouri.

On June 21, 1978, the mandate of the Missouri Court of Appeals, St. Louis District, was received and entered into the record of St. Louis County, Missouri. By an order of that Court dated June 29, 1978, a temporary restraining order previously entered was continued in full force and effect pending application to the United States Supreme Court for a Writ of Certiorari. Enforcement of St. Louis County Ordinance No. 7546 is thereby stayed pending a determination by this Honorable Court of this petition for a writ of certiorari.

RAISING OF THE FEDERAL QUESTIONS

This litigation commenced upon the filing by petitioners of a petition in the Circuit Court of St. Louis County, Missouri, for a declaratory judgment, interlocutory and permanent injunctive relief. In that petition, petitioners raised various federal constitutional questions under the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States. The judgment of the trial court was a declaration that St. Louis County Ordinance No. 7546 is constitutional, lawful and valid.

On appeal, petitioners re-raised and preserved the numerous federal constitutional questions in their briefs and arguments before the Missouri Court of Appeals, St. Louis District. The arguments relating to federal constitutional questions were rejected by that court as shown in the following excerpts from the court's opinion:

> "Appellants argue the trial court erred in declaring the ordinance constitutional because respondent failed to meet its burden of demonstrating a compelling state interest as justification for the ordinance."
>
> * * * * * * * *
>
> "They assert that enforcement of the ordinance would infringe upon the constitutionally guaranteed right of privacy insofar as it would proscribe private sexual conduct between consenting adults."
>
> * * * * * * * *
>
> "Appellants urge that implicit in the concept of ordered liberty is the fundamental privacy right of its employees and patrons to participate in sexual massage activities in the seclusion afforded by appellants' massage establishments."
>
> * * * * * * * *
>
> "Appellants further contend the ordinance is unconstitutionally overbroad, and therefore void and unenforceable."

In addition there were numerous other references throughout the Court's opinion indicative of the raising and rejecting of federal constitutional questions. The same questions were raised in the various motions for rehearing and applications for transfer subsequent to the filing of the opinion by the Missouri Court of Appeals, St. Louis District.

REASONS FOR GRANTING THE WRIT

I

Compelling State Interests

This litigation commenced upon the filing by petitioners of a petition in the Circuit Court of St. Louis County, Missouri, for a declaratory judgment, interlocutory and permanent injunctive relief. Respondent neither filed an answer to petitioners' petition nor in any other manner asserted or suggested a legitimate state interest in the conduct sought to be prohibited. The granting by the trial court of what must be termed a "summary judgment" procedurally precluded respondent from asserting any legal basis of a compelling state interest nature in justification of the ordinance. Respondent had neither prayed nor moved for such relief and the premature judgment of the trial court foreclosed respondent from establishing any legal basis sufficient to sustain the trial court's finding that the ordinance was constitutional, lawful and valid.

The United States Supreme Court has clearly recognized that the burden of justifying the type of legislation herein challenged, which infringes upon fundamental sexual rights, lies heavily upon the respondent.

> "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest.' "[1]

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[1] *Roe*, et al. v. *Wade*, etc., 410 U.S. 113, 155 (1973). See: *Paris Adult Theatre I*, et al. v. *Slayton*, etc., et al., 413 U.S. 49, 65 (1973); and *Memorial Hospital*, et al. v. *Maricopa County*, et al., 415 U.S. 250, 254 (1974).

This principle is particularly applicable when "one's beliefs, ideas, politics, religion, cultural concerns, and the like"[2] become involved; a situation present at bar.[3]

> "Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty."[4]

While this axiom of the heavy burden upon the respondent to justify legislative interference with the fundamental right to private sexual conduct is capable of being succinctly stated, its importance should not be overshadowed by either its brevity or clarity. Respondent, the County of St. Louis, has failed to assert, demonstrate and/or to prove any state interests which even approach the level of interests intrinsic to individual privacy within the realm of sexual expression, much less any state interests of a "compelling" magnitude or nature.

The applicability of the "compelling state interest" standard to the factual circumstances here has been widely recognized in numerous cases deciding the constitutionality of state statutes attempting to regulate private sexual conduct.[5]

Petitioners respectfully submit that this Honorable Court can compare the total denial of due process by the trial court in these proceedings by reason of the complete absence of an evi-

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[2] *California Bankers Assn.* v. *Schultz*, etc., et al., 416 U.S. 21, 86 (1974).

[3] See: Gelinas, Roe v. Wade *and* Doe v. Bolton: *The Compelling State Interest Test in Substantive Due Process,*" 30 WASH. & LEE L.REV. 628 (1973).

[4] *O'Connor* v. *Donaldson*, 422 U.S. 563, 575 (1975).

[5] *State of Iowa* v. *Pilcher*, 242 N.W.2d 348, 359 (Iowa 1976); *The People of the State of New York* v. *Rice*, et al., 80 Misc. 2d 511, 515 (1975), 363 N.Y.S.2d 484, 488. See: *Broadrick*, et al. v. *Oklahoma*, et al., 413 U.S. 601, 611-612 (1973).

dentiary hearing or opportunity for same with the denial of due process found by this Court in the termination of utility services.[6]

That the failure to afford petitioners an evidentiary hearing denied them their constitutional rights cannot be disputed. Surely it was the lack of a record that led to the mischaracterization by the Missouri Court of Appeals, St. Louis District, of the challenged ordinance as being civil rather than criminal in nature.[7] So too, the lack of an evidentiary basis for findings of fact must have contributed to that Court's categorization of petitioners' activities as occurring in "places of public accommodation" as opposed to "private places". The record in this case is absolutely silent as to the location, circumstances and conditions under which massages are administered by petitioners. Again, no factual record was made nor trial held. There is no reason to believe from the basis of the record that massages are not, in fact, given in the customer's home or another locale affording total privacy. There was and is no legal justification for the Missouri Court of Appeals, St. Louis District's, comparison of petitioners' activities to the total lack of privacy prevailing in a public movie house such as this involved in *Paris Adult Theatre I, et al. v. Slayton, etc., et al.*, 413 U.S. 49 (1973), and reliance upon that decision on that issue is misplaced.

II

Privacy

Although privacy is not a concept protected by the Constitution *per se*, it is a concept long recognized as fundamental to the rights, privileges and immunities guaranteed citizens of the

[6] *Memphis Light, Gas and Water Division*, et al. v. *Craft*, et al., — U.S. —, 46 L.W. 4398 (May 1978).

[7] See the Court's Opinion, Appendix B.

United States. As early as 1891, this Court, in *Union Pacific Railway Company v. Botsford*, 141 U.S. 250 (1891), recognized that:

> "No right is held more sacred, or is more carefuliy guarded . . . than the right of every individual to the possession and control of his own person . . . 'The right to one's person may be said to be a right of complete immunity: to be let alone.' " 141 U.S. at 251.

The right of privacy has in a variety of contexts been held to be implicit in a multitude of constitutional settings. Among others, it has been established within the First Amendment freedom of association,[8] within the First Amendment freedom of speech,[9] within the Fourth Amendment restraint on search and seizure,[10] within the Ninth Amendment's unenumerated rights,[11] within the Fourteenth Amendment equal protection guarantee,[12] within the Fourteenth Amendment due process guarantee[13] and within the penumbra of the Bill of Rights.[14] It unquestionably also inately resides within the First Amendment freedom of religion and within the Fifth Amendment restraint on self-incrimination.

The antecedents and progeny of *Griswold, et al. v. Connecticut*, 381 U.S. 479 (1965), offer generalized support for apply-

[8] *National Association for the Advancement of Colored People* v. *Alabama* ex rel. *Patterson*, etc., 357 U.S. 449 (1958).

[9] *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

[10] *Terry* v. *Ohio*, 392 U.S. 1 (1968).

[11] *Griswold*, et al v. *Connecticut*, 381 U.S. 479 (1965), *Goldberg, J., concurring.*

[12] *Loving*, et ux. v. *Virginia*, 388 U.S. 1 (1967).

[13] *Roe*, et al. v. *Wade*, etc., 410 U.S. 113 (1973).

[14] *Griswold, supra, Golberg, J., concurring.*

ing a presumptive constitutional right of privacy to sexual relations and conduct.

Griswold, supra, is not an isolated decision confined to its facts, but is one in a continuing line of decisions involving various aspects of personal privacy and family autonomy.[15]

When the decisions are examined, they plainly support a "fundamental . . . right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Stanley v. Georgia,* 394 U.S. 557, 564 (1969). Indeed, *Stanley, supra,* is of special importance, for there a majority of the Court embraced with approval the very significant language from Mr. Justice Brandeis' dissent in *Olmstead,* et al. *v. United States,* 277 U.S. 438 (1928).

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

[15] Commentary on the *Griswold* case has been extensive. Particularly noteworthy materials include: Kelly, *Clio and the Court: An Illicit Love Affair,* 1965 SUP. CT. REV. 119; Gross, *The Concept of Privacy,* 42 N.Y.U.L. REV. 34 (1967); Pilpel, *Birth Control and a New Birth of Freedom,* 27 OHIO ST. L.J. 679 (1966); Franklin, *The Ninth Amendment,* etc., 40 TUL. L. REV. 487 (1966); Beaney, *The Griswold Case and the Expanding Right to Privacy,* 1966 WIS. L. REV. 979; *Symposium—Comments on the Griswold Case,* 64 MICH. L. REV. 197 (1965); Note, *The Uncertain Renaissance of the Ninth Amendment,* 33 U. CHI. L. REV. 814 (1966); Note, 60 Nw. U.L. REV. 813 (1966); Note, *The Supreme Court—1964 Term,* 79 HARV. L. REV. 56, 162-65 (1965).

The right of sexual privacy has been extended into the areas of contraception for both married[16] and single[17] persons, abortion,[18] acts with non-spousal partners,[19] acts of oral-sexual expression between heterosexuals[20] and the right to possess privately obscene material.[21]

The singular issue in this cause is the constitutional challenge to the statutory prohibition defining as criminal,

> " 'Sexual conduct' which occurs where there is:
>
> . . .
>
> (c) 'Sexual contact' which means any touching, manual or otherwise, of the anus or genitals of one person by another.
>
> "4. 'Something of Value' means any money or property, or any token, object or article exchangeable for money or property." (St. Louis Co. Ord. No. 713.030).

The challenged section, if strictly construed, gives no consideration to the individual's particular desires, needs or circumstances. It impinges severely upon the individual's dignity. It is a first order invasion of privacy.

It must be emphasized that the opinion of the Missouri Court of Appeals, St. Louis District, rejected petitioners' arguments

[16] *Griswold,* et al. v. *Connecticut,* 381 U.S. 479 (1965).

[17] *Eisenstadt,* etc. v. *Baird,* 405 U.S. 438 (1972).

[18] *Roe,* et al. v. *Wade,* etc., 410 U.S. 113 (1973); *Doe,* et al. v. *Bolton,* etc., et al., 410 U.S. 179 (1973); *Planned Parenthood of Central Missouri,* etc., et al. v. *Danforth,* etc., et al., — U.S. — (1976).

[19] *Fadgen* v. *Lenkner,* — Pa. — (1976), 365 A.2d 147; *Wyman* v. *Wallace,* 15 Wash.App. 395 (1976), 549 P.2d 71.

[20] *Lovisi,* et al. v. *Slayton,* etc., et al., 539 F.2d 349 (4th Cir. 1976).

[21] *Stanley* v. *Georgia,* 394 U.S. 557 (1969).

relating to privacy because of their commercial aspect. That Court's reliance upon *Brown, et al. v. Haner, et al.*, 410 F.Supp. 399 (W.D.Va. 1976), for the proposition that rights of privacy lose their constitutional protection when asserted in a commercial context is unwarranted. Such *dicta* by the District Court in *Brown, supra*, is without legal support and contrary to a host of decisions by this Honorable Court.[22]

The opinion of the Missouri Court of Appeals, St. Louis District, cited *Roe et al. v. Wade, etc.*, 410 U.S. 113 (1973), in recognition of the right of privacy but ignored the fact that the same rights of privacy in the abortion context have been recognized in the commercial sphere both as to abortion providers,[23] and as to abortion advertisers.[24] Similarly, this Honorable Court has recognized the rights of privacy relating to contraception as having the full panoply of constitutional protections although asserted in the commercial context by vendors of the products.[25]

It is clear that the fundamental right of sexual privacy extends to sexual acts between heterosexuals performed in private. A recent line of appellate cases confirms these principles and discards the anachronistic and historical basis for regulating such conduct. This trend has been mandated by a line of decisions by the United States Supreme Court, set forth, *supra*.

While no reported cases exist reviewing statutes attempting merely to prohibit heterosexual non-sodomitical touching (such

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[22] *First National Bank of Boston*, et al. v. *Bellotti*, etc., et al., — U.S. —, 46 L.W. 4371 (April 26, 1978); *Bates*, et al. v. *State Bar of Arizona*, 433 U.S. 350 (1977); *Linmark Associates, Inc.*, et al. v. *Township of Willingboro*, et al., 431 U.S. 85 (1977); *Virginia State Board of Pharmacy*, et al. v. *Virginia Citizens Consumer Council, Inc.*, et al., 425 U.S. 748 (1976).

[23] *Singleton*, etc. v. *Wulff*, et al., 428 U.S. 106 (1976).

[24] *Bigelow* v. *Commonwealth of Virginia*, 421 U.S. 809 (1975).

[25] *Carey*, etc., et al. v. *Population Services International*, et al., 431 U.S. 678 (1977).

as regulated here), a wealth of cases voiding regulation of oral-genital or anal-genital contact are available for guidance. Manifestly, the touching conduct regulated here is significantly less offensive and substantially less capable of appropriate regulation through the exercise of police power, than the sodomitical conduct reviewed by other courts. While it might reasonably be suggested that acts of sodomy are offensive to the community-at-large, it can hardly be contended that the same is true of mere touching, which is presupposed by any act of sexual intercourse.

This is confirmed by the existence of a state-wide regulation of sodomitical acts, consisting of "the detestable and abominable crime against nature, committed with mankind or with beast, with the sexual organs or with the mouth," by a felony statute (R.S.Mo. § 563.230) and the total absence of other sexual touching regulation by the state. Correspondingly, the constitutional standards by which prohibitions on sexual touching (other than acts of sodomy) are to be adjudged should be more strictly construed than the same standards when applied to acts of sodomy.

As most recently stated by the Supreme Court of Iowa, in voiding as unconstitutional the state's sodomy statute,

> ". . . section 705.1 in its present form is unconstitutional as an invasion of fundamental rights, such as the personal right of privacy, to the extent it attempts to regulate through use of criminal penalty consensual sodomitical practices performed in private by adult persons of the opposite sex." *State of Iowa v. Pilcher*, 242 N.W.2d 348, 359 (Iowa 1976).

Similarly, other state appellate courts in Massachusetts, New Jersey and New York have, in recent years, reached identical conclusions as to their respective sodomy statutes.

". . . a new factor has appeared with the articulation of the constitutional right of an individual to be free from government regulation of certain sex-related activities.

. . .

"In light of these changes and in light of our own awareness that community values on the subject of permissible sexual conduct no longer are as monolithic as the *Jaquith* case suggested they were in 1954, we conclude that § 35 must be construed to be inapplicable to private, consensual conduct of adults." *Commonwealth v. Balthazar*, 366 Mass. —, — (1974), 318 N.E.2d 478, 480-481.

"We agree and now hold that our statute does not include within its prohibition the conduct of married couples." *State of New Jersey v. Lair*, 62 N.J. 388, 396 (1973), 301 A.2d 748, 753.

Two New York decisions[26] have struck down the state's sodomy law on equal protection grounds for discriminating between married and unmarried persons. Both decisions clearly indicate the unconstitutionality of statutes regulating heterosexual conduct between consenting adults.

In addition, courts in Pennsylvania[27] and Washington[28] have recently struck down causes of action regulating sexual intercourse outside of marriage, through alienation of affection and criminal conversation claims. As observed earlier, sexual intercourse, *per se*, presupposes the touching of another's genitals in the very manner prohibited by the legislation, herein challenged.

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[26] *The People of the State of New York* v. *Johnson*, 77 Misc.2d 889, 891 (1974), 355 N.Y.S.2d 266, 267-268; *The People of the State of New York* v. *Rice*, et al., 80 Misc.2d 511, 515-517 (1975), 363 N.Y.S.2d 484, 487-488.

[27] *Eadgen* v. *Lenkner*, — Pa. — (1976), 365 A.2d 147.

[28] *Wyman* v. *Wallace*, 15 Wash.App. 395 (1976), 549 P.2d 71.

The federal courts have reached identical conclusions. In *Cotner v. Henry*, etc., 394 F.2d 873 (7th Cir. 1968), *cert. denied*, 393 U.S. 847 (1968), the Seventh Circuit interpreting the Indiana sodomy statute held that,

". . . Indiana courts could not interpret the statute constitutionally as making private consensual physical relations between married persons a crime absent a clear showing that the state had an interest in preventing such relations, which outweighed the constitutional right to marital privacy." 394 F.2d at 875.

In *Buchanan*, et al. v. *Batchelor*, etc., et al., 308 F.Supp. 729 (N.D.Tex. 1970), *vacated and remanded on other grounds*, 401 U.S. 989 (1971), an unanimous three-judge federal panel voided the state's sodomy statute and held that,

"Sodomy is not an act which has the approval of the majority of the people. In fact such conduct is probably offensive to the vast majority, but such opinion is not sufficient reason for the State to encroach upon the liberty of married persons in their private conduct. Absent some demonstrable necessity, matters of (good or bad) taste are to be protected from regulation." 308 F.Supp. at 733.

In *Lovisi*, et al. v. *Slayton*, etc., et al., 363 F.Supp. 620 (E.D.Va. 1973), *affirmed*, 539 F.2d 349 (4th Cir. 1976), the federal court, although upholding the state court conviction of the defendant because the act charged had been conducted publicly and not privately, observed that,

"The Court concludes that the rationale expressed in *Eisenstadt* extends to protect the manner of sexual relations between unmarried persons. It is not marriage vows which makes intimate and highly personal the sexual behavior of human beings. It is, instead, the nature of

sexuality itself or something intensely private to the individual that calls forth constitutional protection. While the condition of marriage would doubtless make more difficult an attempt by government to justify an intrusion upon sexual behavior, this condition is not a prerequisite to the operation of the right of privacy." 363 F.Supp. at 625.

Lastly, in *The United States v. Brewer*, 363 F.Supp. 606, (M.D.Pa. 1973), *affirmed*, 491 F.2d 751 (3rd Cir. 1973), the federal court, while upholding the prohibition against sodomy within state prisons, noted,

> "While there has been no Supreme Court decision on the precise issue of the constitutional validity of statutes aimed at preventing 'deviant sexual conduct,' the apparent trend of recent decisions would indicate that such a right among or between consenting adults does exist." 363 F.Supp. at 607.

The applicability of the foregoing discussion of sexual privacy in the context of sodomitical acts approaches argumentive overkill to the issue at hand. Sodomy is always considered as deviant, undesired or disapproved sexual behavior. The issue here is merely touching, not sodomy. It must be borne in mind that petitioners do not challenge in this cause § 713.030(3)(b) prohibiting "any sexual act involving the genitals of one person and the mouth, tongue or anus of another person". Petitioners challenge only § 713.030(3)(c) prohibiting "any touching, manual or otherwise, of the anus or genitals of one person by another". It is extremely difficult to conceive of any consequential sexual act, whether terminating in intercourse or not, which does not imply or involve the touching of another's genitals. The prohibition includes all sexual foreplay or "petting", regardless of whether it culminated in sexual intercourse.

Any doubt as to the correctness of prior courts' holdings in this area is dissipated by the extreme measure of regulation imposed in this cause, when compared to the attempts to regulate specific, identifiable acts of sodomy in analogous cases.

A second and collateral, although independent element of privacy, is invaded by the challenged section. The privacy of the home is threatened here. The scope of the section herein challenged easily extends to the privacy of the home and the ordinance contains no self-limiting features as to where, much less as to whom, why and when, discussed, *infra*.

The inviolate privacy of the home has been recognized by the Supreme Court in relation to the possession of obscene material,[29] and by the Alaska Supreme Court in relation to marijuana use.[30] As so aptly noted by Justice Harlan, dissenting in *Poe, et al. v. Ullman*, etc., 367 U.S. 497, 548 (1961);

> "This enactment involves what, by common understanding throughout the English-speaking world, must be granted to be a most fundamental aspect of 'liberty', the privacy of the home in its most basic sense, and it is this which requires that the statute be subjected to 'strict scrutiny'."

A majority of the United States Supreme Court agreed in *United States v. Orito*, 413 U.S. 139, 142 (1973), when it held that, "(t)he Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of . . . procreation. . . ."

The protection of various rights in the marital family context has firm origins in decisions dating back over fifty years. A first and recent example, *Loving*, et ux. v. *Virginia*, 388 U.S. 1, 12

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[29] *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

[30] *Ravin* v. *State of Alaska*, 537 P.2d 494 (Alaska 1975).

(1967), specifically held that the due process clause of the Fourteenth Amendment protects "[t]he freedom to marry . . . as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving, supra,* stands for the proposition that "the right to marry" is protected by the due process clause, although not specifically mentioned in the Bill of Rights. Petitioners contends that *Loving, supra,* lends further support to the conclusion that other important interests associated with sexual conduct are protected from arbitrary, governmental intrusion.

Associated with the right to marry is the right to rear children, if one chooses, without arbitrary, state interference. An unanimous Supreme Court has held that "the right to have offspring" is a constitutionally protected "human right" which cannot be taken away by a discriminatory statute requiring the sterilization of some persons convicted of crimes, but not of others similarly situated. *Skinner v. Oklahoma* ex rel. *Williamson,* etc., 316 U.S. 535, 536 (1942). Again, the right to have offspring is not specified in the Bill of Rights. However, the Supreme Court in *Skinner, supra,* composed of Justices Douglas (author of the opinion), Black, Reed, Frankfurter, Murphy, Byrnes, Roberts, Jackson, and Chief Justice Stone (the latter two wrote concurring opinions), had no difficulty holding that this right was protected by the Constitution. Moreover, these members of the Supreme Court had all disassociated themselves from the economic, substantive, due process school of thought found in the much criticized and overruled opinion of *Lochner v. New York,* 198 U.S. 45 (1905).

Further cases upholding rights associated with the family include *Pierce,* etc., et al. *v. Society of Sisters,* 268 U.S. 510 (1925), and *Meyer v. State of Nebraska,* 262 U.S. 390 (1923), both of which were subsequently reaffirmed in *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944), and *Griswold,* et al. *v. Connecticut,* 381 U.S. 479, 483 (1965). An unanimous Court

in *Pierce, supra,* recognized a right to send one's children to private school. This right was derived from "the liberty of parents and guardians to direct the upbringing and education of children under their control." 268 U.S. at 534-535. The Supreme Court in *Pierce, supra,* moreover, included Justices who rejected the economic, due process formula of *Lochner, supra,* namely Justices Brandeis, Holmes, and Stone.

Not dissimilar to *Pierce, supra,* was *Meyer, supra,* a 7-2 decision invalidating a state statute which prohibited the teaching of German to pupils below the eighth grade. The Supreme Court in *Meyer, supra,* found that the due process clause included "the right . . . to marry, establish a home and bring up children." 262 U.S. at 399. Again, the decision is not objectionable as a manifestation of economic due process, because it was joined by Justice Brandeis, among others, who rejected the *Lochner, supra,* scheme. The dissents, moreover, by Justices Holmes and Sutherland, rested on the assumption that the state had a substantial interest in assuring that foreign-born students and students of alien parentage had considerable training in the English language, before being exposed to other languages.[31] Not to be ignored are the companion abortion cases decided in 1973, dealing with the fundamental right of privacy as to the physical control of a woman's body in the termination of pregnancy. *Roe, supra,* 410 U.S. 113 (1973) and *Doe,* et al. *v. Bolton,* etc., et al., 410 U.S. 179 (1973).

Taken together, the *Griswold, Stanley, Loving, Skinner, Pierce, Meyer, Roe* and *Doe* decisions, *supra,* all illustrate that

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[31] See: *Poe,* et al. v. *Ullman,* etc., 367 U.S. 497, 551-552 (1961) (*Harlan, J., dissenting*),

> "[T]he integrity of . . . [family] life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right . . . Of this whole 'private realm of family life' it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations."

the Constitution protects certain privacy, sexual and family interests from government intrusion, unless a substantial and compelling justification exists and is proven for such legislation. Such is and was not the case at bar.

III

Overbreadth

When rights of sexual privacy are statutorily invaded in a manner that may be justified by a compelling state interest, it is, nevertheless, required that such "legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Roe*, et al. *v. Wade*, etc., 410 U.S. 113, 155 (1973).[32]

Here, the challenged section sweeps unnecessarily broad. Facially, it prohibits all touching of another's genitals or anus "in return for something of value." Within its scope included and subject to criminal sanctions are general medical practice and the recognized specialties of obstetrics, gynecology, urology and proctology. It unduly restricts the services of nurses and hospital orderlies in the handling of patients. Within its expansive scope is included barter arrangements between spouses in return for sexual participation. It literally prohibits the changing of a diaper for or the bathing of an infant by a compensated babysitter. It is not restricted by touching for sexual gratification nor to touching for sexual climax.

The gross and inexcusable overbreadth of this section and its total failure to eliminate the misperceived evil intended are direct results of the constitutional impermissibility of what was intended. Respondent has made illegal, for an endless variety of legitimate, health and normal sexual purposes, the accepted

[32] See: *California Bankers Assn. v. Schultz*, etc., et al., 416 U.S. 21, 85-86 (1974), *Douglas, J., dissenting.*

practice of touching the genitals or anus of another on a basis less than purely *gratis*.

The statute fails to exclude named persons from its language and, in fact, permits no exclusions of any kind from the mandate of its specific terms. Any attempt to exclude married persons would not save this section from its glaring unconstitutionality, for as the United States Supreme Court has noted,

> "If the right of privacy means anything, it is the right of the **individual,** married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person . . ." *Eisenstadt*, etc. v. *Baird*, 405 U.S. 438, 453 (1972).

This distinction has repeatedly been recognized by cases striking down legislation which attempted to regulate sexual conduct in an overbroad fashion.[33]

While it may well be that the intent behind the adoption of this section was to regulate massage parlors (a fact not in evidence before the Trial Court); it is the very obtuseness of its drafting in an effort to avoid revealing its real intent that has produced its fatal constitutional flaw. Inclusion into the section of some reference to massage or to its purpose would have perhaps resulted in a legislative enactment "narrowly drawn to express only the legitimate state interests at stake." *Roe, supra*, 410 U.S. at 155. This, respondent choose not to do, and can not accomplish the same here by the power of suggestion.

Further the challenged section makes an erroneous irrebuttable presumption that all "touching, manual or otherwise,

[33] See: *State of Iowa* v. *Pilcher*, 242 N.W. 2d 348, 358 (Iowa 1976); *Buchanan*, et al. v. *Batchelor*, etc., et al., 308 F.Supp. 729, 735 (N.D. Tex. 1970), *vacated and remanded on other grounds*, 401 U.S. 989 (1971); *The People of the State of New York* v. *Johnson*, 77 Misc.2d 889, 891 (1974), 355 N.Y.S.2d 266, 267; and *The People of the State of New York* v. *Rice*, et al., 80 Misc.2d 511, 515 (1975), 363 N.Y.S.2d 484, 489.

of the anus or genitals of one person by another", in return for something of value", is against public morality and in need of prohibition. The absurdity of the presumption is evidenced by the examples in medicine, the family, any sexual relations, *etc.*, set forth above, as well as numerous other common life experiences.

The incorporation by the challenged section of an 'irrebuttable presumption," which is, in fact, refutable and whose underlying principle is baseless and unwarranted, has been frequently prohibited as a violation of due process.

> "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.
>
> "Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests. . . . It therefore cannot stand."[34]

The prohibition against the incorporation into statutes of unwarranted presumptions has been reaffirmed in prior, related cases dealing with sexual (gender) preferences,[35] illegitimacy

[34] *Stanley* v. *Illinois*, 405 U.S. 645, 656-657 (1972).

[35] *Reed* v. *Reed*, etc., 404 U.S. 71, 75-76 (1971); *Frontiero*, et vir v. *Richardson*, etc., et al., 411 U.S. 677, 688-689 (1973); and *Weinberger*, etc. v. *Wiesenfeld*, 420 U.S. 636, 642-643 (1975).

of children[36] and pregnancy.[37] When governmental action "rests on an irrebuttable presumption often contrary to fact . . . (i)t therefore lacks critical ingredients of due process."[38] It has been suggested that such presumptions may be a parameter and/or surrogate of equal protection, as well as of due process.[39]

The Missouri Court of Appeals, St. Louis District, erred in finding the challenged ordinance to be neither vague nor overbroad as applied to petitioners. That Court held that "[m]assage activities involving sexual touching would be prohibited by the ordinance."[40]

Clearly, that interpretation of the scope of the ordinance is correct. However, it must be emphasized that the ordinance does not limit itself to a prohibition of touching for sexual purposes. On the contrary, the ordinance prohibits "any touching, manual or otherwise."[41]

The record in this cause, such as it is, does not reveal that petitioners touch their clients for sexual purposes and yet that

[36] *Stanley*, *id.*, *supra*, at note 30; *Jimenez*, et al. v. *Weinberger*, etc., 417 U.S. 628, 631-634 (1974); *Gomez* v. *Perez*, 409 U.S. 535, 538 (1973); and *New Jersey Welfare Rights Organization*, et al. v. *Cahill*, etc., et al., 411 U.S. 619, 620-621 (1973).

[37] *Cleveland Board of Education*, et al. v. *LaFleur*, et al., 414 U.S. 632, 643-648 (1974); and *Andrews*, et al. v. *The Drew Municipal Separate School District*, et al., 507 F.2d 611, 615-616 (5th Cir. 1975), *cert. denied*, 425 U.S. 559 (1976).

[38] *United States Department of Agriculture*, et al. v. *Murry*, et al., 413 U.S. 508, 514 (1973).

[39] Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 MICH. L. REV. 800 (1974); and Case Comment, *Constitutional Law: Court Substitutes Conclusive Presumption Approach for Equal Protection Analysis*, 58 MINN. L. REV. 965 (1974).

[40] See the Court's Opinion in Appendix B.

[41] See subsection (c) of section 3 in Appendix A.

is the assumption upon which the Missouri Court of Appeals, St. Louis District, bases its opinion. The real overbreadth challenge to the ordinance at issue is not directed to its obviously impermissible applications to "the normal functions of obstetricians, gynecologists, urologists, proctologists, nurses and baby-sitters,"[42] but to its blatant overbreadth as applied to these petitioners.

The Missouri Court of Appeals, St. Louis District, in an effort to uphold the constitutionality of the challenged ordinance, chose to overlook the absence of any evidence or finding that petitioners fall within the ambit of its perhaps intended, although clearly not expressed, attempt to criminalize sexual massage. That Court did not give effect to the challenged ordinance as it was written, but rather acted as a superlegislature and added an additional element of sexuality to the ordinance, thereby rewriting it.

Clearly, petitioners have standing to raise a challenge to the overbreadth of the ordinance. As previously stated, vendors of services may raise the privacy, equal protection and other constitutional rights of third parties, outside the First Amendment context.[43]

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[42] See the Court's Opinion in Appendix B.

[43] *Singleton, supra; Craig, et al. v. Boren, etc., et al.*, 429 U.S. 190 (1976); and, *Carey, supra.*

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX

APPENDIX A

Bill No. 178, 1975
Ordinance No. 7546, 1975
Introduced by Councilman Breihan

AN ORDINANCE
AMENDING TITLE VII, CHAPTER 713, SLCRO 1964, AS AMENDED, THE VICE AND MORALITY CODE, BY REPEALING THEREFROM SECTIONS 713.030, 713.040, 713.050 AND 713.080, AND ENACTING AND ADDING THERETO THREE NEW SECTIONS TO BE NUMBERED 713.030, 713.040 AND 713.080, RELATING TO THE REGULATION OF PROSTITUTION.

BE IT ORDAINED BY THE COUNTY COUNCIL OF ST. LOUIS COUNTY, MISSOURI, AS FOLLOWS:

SECTION 1. Sections 713.030, 713.040, 713.050 and 713.080 SLCRO 1964, as amended, are hereby repealed.

SECTION 2. Title VII, Chapter 713, SLCRO 1964, as amended, the Vice and Morality Code, is hereby amended by enacting and adding thereto three new sections, to be numbered 713.030, 713.040 and 713.080, relating to the regulation of prostitution, which new sections shall read as follows:

713.030 **Definitions** 1. The term "person" as used in this Chapter shall mean any natural person, firm, partnership, co-partnership, association, corporation or organization of any kind.

2. A person commits "prostitution" if he or she engages or offers or agrees to engage in sexual conduct in return for something of value to be received by the person or a third person.

3. "Sexual Conduct" occurs when there is:

(a) "Sexual Intercourse" which occurs when there is any penetration of the female sex organ by the male sex organ;

(b) "Deviate Sexual Intercourse" which means any sexual act involving the genitals of one person and the mouth, tongue or anus of another person;

(c) "Sexual contact" which means any touching, manual or otherwise, of the anus or genitals of one person by another.

4. "Something of Value" means any money or property, or any token, object or article exchangeable for money or property.

5. "Promoting prostitution" occurs when a person knowingly promotes, solicits, compels, or encourages a person to engage in prostitution or patronize prostitution.

6. "Profiting from Prostitution" occurs when a person, acting other than as a prostitute receiving compensation for personally rendered prostitution services, knowingly accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he or she participates or is to participate in the proceeds of prostitution activity.

713.040 **Prostitution, Promoting Prostitution, Profiting from Prostitution—Prohibited.**—A person shall not engage in prostitution, promoting prostitution, or profiting from prostitution.

713.080 **Penalties**—Any person violating any of the provisions of this Chapter shall upon conviction be punished by a fine not exceeding One Thousand Dollars ($1,000.00) or by imprisonment in the County Jail for not exceeding one (1) year, or both such fine and imprisonment.

APPENDIX B

In the Missouri Court of Appeals
St. Louis District
Division Two

CAESAR'S HEALTH CLUB, et al., Plaintiffs-Appellants, vs. ST. LOUIS COUNTY, MISSOURI, Defendant-Respondent.	No. 38558 Appeal from the Circuit Court St. Louis County Hon. George W. Cloyd, Judge OPINION FILED April 11, 1978

Respondent, the County of St. Louis, enacted an ordinance prohibiting prostitution. Appellants, twelve corporations or proprietorships, each a so-called "massage parlor" operating in St. Louis County, filed a petition to enjoin enforcement of the ordinance and to have it declared unconstitutional. The Circuit Court of St. Louis County declared it "to be constitutional; lawful and valid", denied a permanent injunction, but stayed its enforcement pending the outcome of this appeal. The ordinance, No. 7546, which was to become effective on August 20, 1975, provides:

"SECTION 2. Title VII, Chapter 713, SLCRO 1964, as amended, the Vice and Morality Code, is hereby amended by enacting and adding thereto three new sections, to be numbered 713.030, 713.040 and 713.080, relating to the regulation of prostitution, which new sections shall read as follows:

713.030 **Definitions** 1. The term "person" as used in this Chapter shall mean any natural person, firm, part-

nership, co-partnership, association, corporation or organization of any kind.

2. A person commits "prostitution" if he or she engages or offers or agrees to engage in sexual conduct in return for something of value to be received by the person or a third person.

3. "Sexual Conduct" occurs when there is:

(a) "Sexual Intercourse" which occurs when there is any penetration of the female sex organ by the male sex organ;

(b) "Deviate Sexual Intercourse" which means any sexual act involving the genitals of one person and the mouth, tongue or anus of another person;

(c) "Sexual contact" which means any touching, manual or otherwise, of the anus or genitals of one person by another.

4. "Something of Value" means any money or property, or any token, object or article exchangeable for money or property.

5. "Promoting prostitution" occurs when a person knowingly promotes, solicits, compels, or encourages a person to engage in prostitution or patronize prostitution.

6. "Profiting from Prostitution" occurs when a person acting other than as a prostitute receiving compensation for personally rendered prostitution services, knowingly accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he or she participates or is to participate in the proceeds of prostitution activity.

713.040 **Prostitution, Promoting Prostitution, Profiting from Prostitution—Prohibited.**—A person shall not engage in prostitution, promoting prostitution, or profiting from prostitution.

713.080 **Penalties**—Any person violating any of the provisions of this Chapter shall upon conviction be punished by a fine not exceeding One Thousand Dollars ($1,000.00) or by imprisonment in the County Jail for not exceeding one (1) year, or by both such fine and imprisonment."

In their petition, appellants admit they "engage in the practice of giving massages at the request of the client, which do result in consensual touching of a person's anus or genitals", and which conduct specifically would be prohibited under §3(c) of the ordinance. Massage activities involving sexual touching would be prohibited by the ordinance, and violation of the ordinance could result in civil prosecution of appellants and their employees. Because this case requires application of established constitutional principles and involves no real issue requiring construction of the United States and Missouri Constitutions, we have jurisdiction. Art. V, §3, Mo. Const. 1945, as amended, 1970. St. Louis County Transit Co. v. Division of Employment Security, 456 S.W.2d 334 (Mo. 1970); Forbis v. Associated Wholesale Grocers, Inc., 513 S.W.2d 760 (Mo. App. 1974).

Appellants argue the trial court erred in declaring the ordinance constitutional because respondent failed to meet its burden of demonstrating a compelling state interest as justification for the ordinance.[1] Appellants correctly cite Roe v. Wade, 410

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[1] Appellants argue in their brief that the trial court ruled prematurely and thereby precluded presentation of evidence of a "compelling state interest". Because the compelling state interest test is here inapplicable, evidence of this nature was not required.

A reading of the record makes it clear the parties submitted the case to the court on the pleadings and memoranda.

U.S. 113 (1973), for the proposition that "[w]here certain 'fundamental rights' are involved, . . . [a] regulation limiting these rights may be justified only by a 'compelling state interest', . . ." *Id.* at 155. Before we invoke this rule, however, it must appear that the challenged statute or ordinance infringes some fundamental right; and while the right of privacy has been recognized as just such a fundamental right, we are not convinced in this case that appellant has asserted a protectable privacy interest. The "compelling state interest" test is therefore inapplicable here.

Rather, we must judge the validity of the challenged ordinance according to the standard applicable to the exercise of police power, and the test of the validity of an exercise of police power is reasonableness. McDonnell Aircraft Corporation v. City of Berkeley, 367 S.W.2d 498 (Mo. 1963). In general, the test of reasonableness is met in any case in which the object of the police measure is a proper one, as we conclude here, and the means adopted to accomplish that object are appropriate. *See* Lawton v. Steele, 152 U.S. 133 (1894), as cited in Goldblatt v. Hempstead, 369 U.S. 590, 594-95 (1962).

The exercise of police power is presumed to be constitutionally valid; the presumption of reasonableness is with the State. Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959); Salsburg v. Maryland, 346 U.S. 545 (1954). The exercise of police power will be upheld if any state of facts either known or which could be reasonably assumed affords support for it. U.S. v. Caroline Products Co., 304 U.S. 144 (1938). The party challenging certain legislation has the burden on the question of its reasonableness. Goldblatt v. Hempstead, *supra.*

The general law in Missouri was stated recently in Flower Valley Shopping Center v. St. Louis County, 528 S.W.2d 749, 753-54 (Mo. banc 1975), *citing* Bellerive Inv. Co. v. Kansas City, 321 Mo. 969, 981, 13 S.W.2d 628, 634 (1929):

> "It has been definitely and clearly established and settled, by the decisions of this court and of the federal Supreme Court, that a statute or a municipal ordinance which is fairly referable to the police power of the state or municipality, and which discloses upon its face, or which may be shown aliunde, to have been enacted for the protection, and in furtherance, of the peace, comfort, safety, health, morality, and general welfare of the inhabitants of the state or municipality, does not contravene or infringe the several sections of the state and federal Constitutions invoked by the appellants herein, and cannot be held invalid as wrongfully depriving the appellants of any right or privilege guaranteed by the Constitution, state or federal; the reason and basis underlying such decisions being that the personal and property rights of the individual are subservient and subordinate to the general welfare of society, and of the community at large, and that a statute or ordinance which is fairly referable to the police power has for its object the 'greatest good of the greatest number.' "

An ordinance prohibiting prostitution is clearly referable to the police power of local government. We believe the ordinance here in question discloses on its face a purpose to protect and further the health, morality and general welfare of the citizenry, and that it furthers its purpose in a reasonable way. We now consider appellants' specific constitutional arguments.

They assert that enforcement of the ordinance would infringe upon the constitutionally guaranteed right of privacy insofar as it would proscribe private sexual conduct between consenting adults. Clearly, no privacy interests of the individual corporations and proprietorships is being asserted here. Rather, it is the right of its employees and customers to engage in certain sexual activities which appellants seek to have protected. Relief is requested not on the basis of some unconstitutionally incurred loss or injury appellants themselves might suffer, but rather on

the basis of perceived rights of third persons who are not party to this litigation. Assuming in this instance that appellants have vicarious standing[2] to assert the rights of its masseuses and customers, we nevertheless find no merit in appellants' claim.

The Supreme Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. ". . . [The] decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit' in the concept of ordered liberty, '. . . are included in this guarantee of personal privacy." Roe v. Wade, *supra* at 152. "This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65-66 (1973) (citations omitted). Appellants urge that implicit in the concept of ordered liberty is the fundamental privacy right of its employees and patrons to participate in sexual massage activities in the seclusion afforded by appellants' massage establishments. For support, they look principally to Griswold v. Connecticut, 381 U.S. 479 (1965) and Stanley v. Georgia, 394 U.S. 557 (1969). Reliance on these cases is unavailing, however. *Griswold* and *Stanley,* and other decisions cited by appellants,[3] in no way intimate that there exists an absolute and unqualified right of privacy, sexual or otherwise. The conclusion which can more readily be drawn from the cases is that the right to privacy is not without limit as to places and relationships. United States v. McKean, 338 A.2d 439 (D.C. App. 1975).

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[2] The problem of standing, as it has arisen principally in the federal courts, ordinarily requires consideration of two distinct questions: first, whether the litigant can demonstrate "a sufficiently concrete interest" in the outcome of the litigation and to render the suit a "case or controversy"; and second, as a prudential matter, whether the litigant is a proper proponent of the particular legal rights on which he bases his suit. Singleton v. Wulff, 96 S.Ct. 2868, 2873 (1976).

[3] In particular, Roe v. Wade, 410 U.S. 113 (1973) and Eisenstadt v. Baird, 405 U.S. 438 (1972).

It is to be noted that the challenged ordinance does not prohibit persons from engaging in acts of massage as such, but from engaging in acts of massage involving sexual touching, for hire. And whatever may be said of the potential right of consenting adults to engage in private sexual massage activities, that, strictly speaking, is not the issue before us. Rather, it is the commercialization of such activities with which we are concerned, and it is this commercial aspect which we believe removes them from the sphere of a protectable right of privacy. *See* Brown v. Haner, 410 F.Supp. 399, 401 (W.D. Va. 1976).

Implicit in appellants' argument is the suggestion that their establishments constitute private places, analogous to the private home in Stanley v. Georgia, *supra,* or the marital bedroom in Griswold v. Connecticut, *supra.* In Paris Adult Theatre I v. Slaton, *supra,* however, the Supreme Court rejected arguments that a place of public accommodation, a theater, was protected by the cloak of privacy. We reach the same conclusion in respect to the essentially commercial establishments here. The activities proscribed by the ordinance are carried on in places "which cannot in contemplation of law reasonably be considered private." United States v. McKean, *supra* at 440. *See also* Harris v. United States, 315 A.2d 569 (D.C.App. 1974). Such activities therefore are not entitled to protection by a constitutional right of privacy.

Appellants further contend the ordinance is unconstitutionally overbroad, and therefore void and unenforceable. The ordinance states that "[a] person commits 'prostitution' if he or she engages or offers or agrees to engage in sexual conduct in return for something of value. . . ." "Sexual conduct" is defined as " 'sexual contact' which means any touching, manual or otherwise, of the anus or genitals of one person by another." The ordinance contains no provision as to whom or what it applies and makes no specific reference to massage establishments. While admitting that the conduct on their

premises falls within the proscriptions of the ordinance, appellants maintain that by defining "sexual conduct" as *any* touching of the anus or genitals of one person by another, the ordinance may be construed to proscribe the normal functions of obstetricians, gynecologists, urologists, proctologists, nurses and baby sitters, all of whom are compensated for services which frequently require touching of the anal and/or genital areas.

Assuming the ordinance might be applied in ways suggested by appellants, we do not believe they may be heard to challenge the ordinance on grounds of overbreadth. The general rule is that "[O]ne to whom application of a statute is constitutional will *not* be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." United States v. Raines, 362 U.S. 17, 21 (1960). Employment of the overbreadth doctrine was restricted by the United States Supreme Court in Broadrick v. Oklahoma, 413 U.S. 601 (1973); it is used "sparingly and only as a last resort." *Id.* at 613. Our Supreme Court, in Chamberlin v. Missouri Elections Com'n, 540 S.W.2d 876, 881 (Mo. banc 1976), has recognized a narrowing of the doctrine. Thus in only limited situations will courts now permit a litigant to assert, by way of the overbreadth doctrine, argued rights of non-litigants to whom a statute might be applied. The one principal exception to the general rule obtains in the first amendment area, where a statute which arguably violates rights of free speech or expression of others may be challenged by one to whom it may be constitutionally applied. Broadrick v. Oklahoma, *supra*, at 611; United States v. Brewer, 363 F. Supp. 606, 609 (M.D. Pa. 1973).

This case presents no issues touching on the first amendment; the ordinance clearly poses no threat to the rights of free speech and expression of doctors, nurses, baby sitters, or

others whose conduct might be said to fall within the literal scope of the ordinance. Indeed, it is upon a theory of privacy that appellants base their claim. Where, as here, certain protected conduct, and not speech, is encompassed by an otherwise valid proscriptive statute, the overbreadth doctrine is rarely applicable. As stated in Broadrick v. Oklahoma, *supra* at 615:

> "[F]acial overbreadth adjudication is an exception to our traditional rules of practice and . . . its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. . . .
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> * * * * * * *
>
> [W]here conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statut's plainly legitimate sweep."

It is our view that the alleged overbreadth of the ordinance is neither real nor substantial. Moreover, because possible invalid applications of the ordinance are highly speculative and not presently before this court, we believe the ordinance should stand "until an actual case corroborates and justifies [appellants] claim of anticipated harm and unconstitutional application." Chamberlin v. Missouri Elections Com'n, *supra*.

That such a case will ever arise seems inconceivable. We cannot bring ourselves to believe that the rights of doctors, nurses, etc., will be, or were even intended to be, affected by the ordinance. In judging the validity of the ordinance, we must be guided by "robust common sense." Common sense

suggests that while the definitional terms of the ordinance may encompass certain activities, as suggested by appellants, the ordinance cannot reasonably be construed to prohibit such activities. The ordinance should not be declared overbroad on the basis of frivolous and speculative invalid applications when a limiting construction can reasonably be placed on it.

The judgment of the trial court is hereby affirmed.

/s/ JAMES R. REINHARD, Judge

Joseph G. Stewart, Presiding Judge, Concurs

Robert G. Dowd, Judge, Concurs

APPENDIX C

No. 60809

In the Supreme Court of Missouri
St. Louis District No. 38558

May Session 1978

Ceasar's Health Club, et al., Appellants,

vs. TRANSFER

St. Louis County, Missouri, Respondent.

Now at this day, on consideration of appellants' Application to transfer the above entitled cause from the St. Louis District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 1978, and on the 15th day of June 1978, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 15th day of June, 1978.

/s/ THOMAS F. SIMON, Clerk
/s/ By JANICE B. HANSON, D.C.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-420

CAESAR'S HEALTH CLUB, et al.,
Petitioners,

v.

ST. LOUIS COUNTY, MISSOURI,
Respondent.

RESPONDENT'S BRIEF

In Opposition to Petition for Writ of Certiorari to the Missouri Court of Appeals, St. Louis District

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RESPONDENT'S BRIEF

In Opposition to Petition for Writ of Certiorari to the Missouri Court of Appeals, St. Louis District

Respondent, St. Louis County, Missouri, a body corporate and politic, files its Brief in Opposition to the Petition of Caesar's Health Club, et al., for Certiorari, received by Respondent's counsel on September 13, 1978, and pray the Court to deny said Petition.

OPINIONS BELOW

Respondent herein concurs with the Statement of Petitioners as to the proceedings of this matter in the Missouri Courts.

JURISDICTION

Respondent herein concurs with the Statement of Jurisdiction of this Court as set forth in the Petition, but prays the Court to deny said Petition.

QUESTIONS PRESENTED

I

Whether the trial court's failure to conduct an evidentiary hearing, in view of the pleadings of this case, has deprived Petitioners of rights guaranteed them under the Constitution of the United States.

II

Whether the challenged St. Louis County Ordinance violates fundamental rights of privacy afforded Petitioners by the Constitution of the United States.

III

Whether the challenged ordinance violates Petitioners' rights to due process of law guaranteed by the Constitution of the United States by reason of its overbreadth.

CONSTITUTIONAL PROVISION, STATUTES AND RULES OF COURT INVOLVED

Amendments to the Constitution of the United States

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging

the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

Fourth Amendment

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Ninth Amendment

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Missouri Statutes

Vernon's Annotated Missouri Statutes, Section 563.230—*The abominable and detestable crime against nature—Penalty*:

> "Every person who shall convicted of the detestable and abominable crime against nature, committed with mankind or with beast, with the sexual organs or with the mouth, shall be punished by imprisonment in the penitentiary not less than two years."

St. Louis County Ordinances

Ordinance No. 7546 (1975):

> "Section 2. Sections 713.030, 713.040, 713.050 and 713.080, SLCRO, 1964, as amended, are hereby repealed.
>
> Section 2. Title VII, SLCRO 1964, as amended, the Vice and Morality Code, is hereby amended by enacting and thereto three new sections to be numbered 713.030, 713.040, and 713.080, relating to the regulation of prostitution, which new sections shall read as follows:
>
> 713.030 *Definitions*: 1. The term 'person' as used in this Chapter shall mean any natural person, firm, partnership, co-partnership, association, corporation or organization of any kind.
>
> 2. A person commits 'prostitution' if he or she engages or offers or agrees to engage in sexual conduct in return

> for something of value to be received by the person or a third person.
>
> 3. 'Sexual Conduct' occurs when there is:
>
> (a) 'Sexual Intercourse' which occurs where there is penetration of the female sex organ by the male sex organ;
>
> (b) 'Deviate Sexual Intercourse' which means any sexual act involving the genitals of one person and the mouth, tongue, or anus of another person;
>
> (c) 'Sexual Contact' which means any touch, manual or otherwise, of the anus or genitals of one person by another.
>
> 4. 'Something of Value' means any money or property, or any token, object or article exchangeable for money or property.
>
> 5. 'Promoting Prostitution' occurs when a person knowingly promotes, solicits, compels, or encourages a person to engage in prostitution or patronize prostitution.
>
> 6. 'Profiting from Prostitution' occurs when a person, acting other than as a prostitute receiving compensation for personally rendered prostitution services, knowingly accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he or she participates or is to participate in the proceeds of prostitution activity.
>
> 713.040 ***Prostitution, Promoting Prostitution, Profiting from Prostitution—Prohibited.*** A person shall not engage in prostitution, promoting prostitution, or profiting from prostitution.
>
> 713.080 ***Penalties.*** Any person violating any of the provisions of this Chapter shall upon conviction be punished

by a fine not exceeding One Thousand Dollars ($1,000.00) or by imprisonment one (1) year, or by both such fine and imprisonment."

STATEMENT

On August 19, 1975, there was filed in the Circuit Court of St. Louis County, Missouri, what was styled "Petition for Declaratory Judgment and Injunctive Relief", in which Caesar's Health Club, Velvet Touch Health Spa, Adam and Eve, King's Harem, Penthouse Health Spa, Hide-Away Club, Shangri-La Health Studio, Magic Touch, Inc., Elite Health Spa, Silk 'N Touch Health Spa, and Goldfinger Health Club were Plaintiffs, and St Louis County, Missouri, was Defendant (Cause No. 371,853).

Said Petition alleged, in part, the following:

"1. Plaintiffs are individual proprietors or duly incorporated businesses authorized to transact business in the State of Missouri and in the County of St. Louis, and are generally engaged in the lawful ownership and operation of massage establishment in the said St. Louis County . . .

"7. Plaintiffs' establishments engage in the practice of giving massages at the request of the client, which do result in consensual touching of a person's anus or genitals. The massage establishments do not violate any County, State or Federal law which is in effect at this time. However, these sexual acts will be prohibited under Bill No. 178, Ordinance No. 7546 and so a continuation of plaintiffs' businesses after this ordinance becomes effective can result in the criminal prosecution of plaintiffs and their employees. Further, if this Ordinance becomes effective and plaintiffs close down their businesses to conform with this Ordinance, they will incur great and substantial economic losses." (See, Appendix A).

Plaintiffs challenged said Ordinance on numerous constitutional and other grounds and prayed for temporary and permanent injunctive relief. On August 19, 1975, Judge George W. Cloyd of the Circuit Court of St. Louis County issued a temporary restraining order against the enforcement of said ordinance, ordering Defendant to show cause on October 14, 1975, why the requested injunction should not be granted.

On October 14, 1975, Defendant filed its "Return to Order to Show Cause and Answer" to Plaintiffs' Petition. (See, Appendix B). The Return and Answer admitted the allegations of Plaintiffs' Petition that Plaintiffs operate massage parlors which engage in the practice of giving massages at the request of their clients which result in consensual touching of the anus or genitals; admitted that these sexual acts will be prohibited under the aforementioned ordinance, and that a continuation of Plaintiffs' businesses would result in their criminal prosecution. The allegations of the incursion of great and substantial economic losses by Plaintiffs were denied.

On November 14, 1975, Plaintiffs filed a Memorandum in Support of their Petition. No mention is made in that memorandum of the lack of a hearing. During the proceedings before the trial court, no request was made of the trial judge for an evidentiary hearing by Plaintiffs.

On December 3, 1975, St. Louis County filed its Memorandum in Opposition, and on December 22, 1975, Plaintiffs filed their reply, which made no mention of a demand for an evidentiary or commented on the lack thereof.

On July 23, 1976, the Circuit Court declared St. Louis County Ordinance No. 7546 to be "constitutional, lawful and valid", dissolved the temporary restraining order and denied permanent injunctive relief.

On April 11, 1978, the Missouri Court of Appeals, St. Louis District, affirmed the Circuit Court's judgment. On May 9,

1978, the Court of Appeals denied Plaintiffs' Motion for Rehearing, and on June 15, 1978, the Missouri Supreme Court denied Motion to Transfer. *Caesar's Health Club v. St. Louis County*, 565 S.W.2d 783 (Mo. App. 1978).

Raising of the Federal Questions

Respondent concurs that all questions pertaining to Federal Constitutional issues were timely and properly raised, with the exception of Petitioners' claim that they were denied a trial or evidentiary hearing regarding the showing by Respondent of a "compelling state interest" in justification of the subject ordinance.

The Missouri Court of Appeals, St. Louis District, properly ruled that the "compelling state interest" standard was not applicable to Petitioners' activities. 565 S.W.2d at 786. Nonetheless, Respondents contend that only before the state appellate tribunal did Petitioners argue their position that an evidentiary hearing was required to determine "compelling state interest." No demand was made upon the trial court for a hearing, and clearly, as noted in the opinion of the Missouri Court of Appeals, St. Louis District, "(a) reading of the record makes it clear the parties submitted the case to the court on the pleadings and memorandum." 565 S.W.2d at 786. Further, Petitioner, in light of the allegations of their petition (see, infra), which Respondents contend fail to set forth fact which indicate activities even arguably entitled to the constitutional right of privacy, and to which Respondents admitted. (Appendix B), cannot be heard to raise the issue of lack of evidentiary hearing. It is respectfully submitted that, although the "right to privacy" and "compelling state interest" issues were properly raised and preserved, the failure to raise before the trial court their contention that an evidentiary hearing was required, indicates lack of " 'timely insistence . . .' " required for the raising of Federal Constitutional issues. *Slagle v. State of Ohio*, 366 U.S. 259, 264 (1961).

REASONS FOR DENIAL OF WRIT

I

The Compelling State Interest Standard Is Inapplicable to the Activities Conducted by Petitioner; Further, Neither the Compelling State Interest Nor the Rational Basis Standard Requires Testimonial, Evidentiary Proof; Further, the Demand for Such Hearing Was Not Properly Preserved as a Federal Question by Petitioner.

Petitioners argue that they have been denied a hearing in this matter, and that Respondents "neither filed an answer to petitioners' petition nor in any other manner asserted or suggested a legitimate state interest in the conduct sought to be prohibited." (Pet., p. 10). What Petitioners claim to have been denied is an evidentiary hearing on the constitutional issues of "compelling state interest" to justify governmental regulation and/or prohibition of activities which Petitioners deem to be fundamental rights. (Pet., pp. 11-12).

The statement that no answer was filed to the original petition in this matter is false. (See, Appendix B). An examination of the petition filed in this case (Appendix A) makes it doubtful that Petitioner properly preserved any question of lack of an evidentiary hearing. The factual allegations of the petition allege only that Petitioners engage in the operation of massage parlors, and that they perform acts for consideration which result in the touching of the anus or the genitals in violation of the aforestated St. Louis County Ordinance. The only harm or loss alleged in such petition was the loss of their massage parlor business resulting from enforcement of the Ordinance. (See, Appendix A). No facts were alleged which would indicate that the acts referred to in the petition were performed in any setting which would give rise to a claim of right of privacy. The record is barren of any facts which would indicate anything except ordi-

nary, commercial undertakings. Certainly, Petitioners also had the option to put in evidence showing that their activities were, indeed, deserving of the protection of the right of privacy.

Legislative enactments are entitled to a presumption of constitutionality. *Davies Warehouse Co. v. Bowles,* 321 U.S. 144, 153 (1944); *United States v. Carolene Products Co.,* 304 U.S. 144, 152 (1938).

A regulatory enactment will normally be judged constitutionally using the "rational basis" test, i.e., will be upheld if any state of facts may reasonably be conceived to justify the regulation. *McGowan v. Maryland,* 366 U.S. 420, 426 (1961) *Caesar's Health Club v. St. Louis County,* supra, at 786. Respondent, as well as the Missouri Court of Appeals, St. Louis District, recognize the general principle advanced by Petitioners that when certain fundamental rights are involved, regulations limiting these rights may be justified only by the showing of a compelling state interest. *Roe v. Wade,* 410 U.S. 113, 155 (1973); *Caesar's Health Club v. St. Louis County,* supra, at 786.

Clearly, under the cases cited, infra, (Section II), no fundamental right as heretofore recognized by the decisions of this Court has been pleaded or argued. The extension of the constitutional right of privacy to activities of commercial sex, can hardly be deemed "implicit in the concept of ordered liberty," *Roe v. Wade,* supra, at 152, so as to require showing by St. Louis County of a compelling state interest. (The facts as pleaded herein even call into serious question the standing of Petitioners as commercial operatives, to raise questions of the privacy rights of their customers, under the criteria set forth in *Singleton v. Wulff,* 428 U.S. 106 (1976). See, *U.S. v. Raines,* 362 U.S. 17, 21 (1960); *McGowan v. Maryland,* supra, at 429-430.)

In Respondent's brief to the trial court (reproduced in part in Appendix C herein), Respondents set forth a number of

bases for regulation of prostitution activities. Further, prostitution has long been recognized as a proper subject for federal, state and local police power regulation. *L'Hote v. City of New Orleans,* 177 U.S. 587 (1900); *Caminetti v. United States,* 242 U.S. 470 (1917). Further, the regulation of "public morality" has been recognized as within the constitutional authority of local government. *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 57-58 (1973); *Young v. American Mini Theatres,* 427 U.S. 50 (1976). *U. S. v. Moses,* 339 A.2d 46 (D.C.App. 1975). In none of the cases cited by Petitioners did either the "compelling interest" or "rational basis" standards require a showing of *testimonial* proof in an evidentiary hearing. It appears that these cases do not depend upon factual proof that a given state of facts exists, or that the method of regulations chosen by the state or local government will in fact correct a perceived problem. Judicial notice of such facts is generally utilized, and recognized as sufficient. *Weaver v. Palmer Brothers,* 270 U.S. 402, 410 (1926); *Powell v. Pennsylvania,* 127 U.S. 678 (1888). It is sufficient if the lawmaking body may rationally believe such facts to be established. 16 Am. Jur. 2d, *Constitutional Law,* Section 170. Further, the Legislature may base its actions on unprovable assumptions, and is not required to "prove" anything. *Paris Adult Theatre I v. Slaton,* supra, at 61. Even in the "compelling state interest" cases, such as *Roe v. Wade,* supra, the Court's determination is not whether, in fact, there is such interest on the part of the state, nor does it turn on questions of fact or credibility of witnesses. In *Roe v. Wade,* there was no doubt as to the state's health interest in abortions, 410 U.S. at 150, but the Court determined that this interest was not sufficiently compelling to warrant interference with the constitutional right of privacy in the abortion decision during the first three months of pregnancy. 410 U.S. at 163.

Petitioners were certainly entitled, if they chose to do so, to put on evidence that the activities engaged in in their massage parlors were private and not harmful. But they did not call

the attention of the Court in any manner, evidence or in a brief, to such facts. Petitioners chose to rely on judicial notice of their operations and did not request a hearing at any stage of the circuit court proceedings. Such demand was effectively waived, and further, was not required by law.

II

Right of Privacy

Respondents concur with Petitioners that the constitutional "right of privacy" has been recognized in a number of constitutional settings (Petition, 13) *Griswold v. State of Connecticut*, 381 U.S. 479 (1965). Respondents, however, believe that Petitioners' attempt to apply such right to the activities in their massage parlors, and thus escape municipal regulations, is not supportable by this Court's decisions. The extension of the "right of privacy" to public commercial activities or to any and all activities by and between consenting adults, represents a departure from the court's rationale in recognizing these rights in the first instance.

A. Limitations of the Right of Privacy.

The very decisions, relied upon to assert and/or establish a constitutional right of privacy with regard to the activities conducted at Petitioners' establishments, set the limitation on those rights. Only personal rights that can be deemed fundamental or implicit in the concept of ordered liberty, *Roe v. Wade*, supra at 152-153, are located in the zone of personal privacy protected by the Constitution. *Griswold v. State of Connecticut*, supra, 485.

That right has been extended to activities relating to marriage, procreation, contraception, family relationships, child rearing and education. *Roe v. Wade*, supra, 152-153.

The physical activities and intimacies within the zone of privacy are not *per se* what is protected in these decisions. It is rather the relationship or the context of the activity which is being protected, the marital relationship, and the decision whether to conceive, and after conception, whether to bear children. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Roe v. Wade*, supra, 153-154; *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1971). The privacy of one's home affords one constitutional protection even with regard to obscene materials, *Stanley v. Georgia*, 394 U.S. 557 (1969), which are not generally entitled to constitutional protection. *Miller v. California*, 413 U. S. 15 (1973).

The Court has not extended the protection of constitutional privacy to obscenity when viewed in a public and commercial setting, for the protection of such activity from regulation is not implicit in the concept of ordered liberty. *Paris Adult Theatre I v. Slaton*, supra, at 66-68; *U. S. v. 12 200-ft. Reels of Super 8mm. Film*, 413 U.S. 123, 126-127 (1973); *U. S. v. Orito*, 413 U.S. 139, 141-142 (1973). There is nothing in the privacy decisions pertaining to procreation, child-bearing, etc., which would extend the constitutional privacy protection to relationships essentially commercial in nature, nor should they be so extended. There is tenuous connection at best between Petitioners' activities with regard to these paying customers and the rights protected in the privacy cases. Petitioners' activities, rather, "minister to and feed upon human weaknesses, appetites and passions." *L'Hote v. City of New Orleans*, supra. When certain activities, arguably protectable under the right of privacy, become merely commercial activities, then these activities become, like all other commercial activities, subject to reasonable regulation under the police powers. See, *Goldblatt v. Town of Hempstead, N.Y.*, 369 U.S. 590 (1962). As stated in *Paris Adult Theatre I v. Slaton*, supra, at 66-67:

"The idea of a 'privacy' right and a place of public accommodation are, in this context, mutually exclusive."

The ordinance in question does not reach into the privacy of the marital bedroom, nor does it affect the decision of whether to conceive or bear children. The ordinance does not even reach to the same activity between two consenting adults (even though this fact alone does not afford Constitutional protection to otherwise prohibited activity, see, infra). The scope of the ordinance reaches purely commercial activity. (There was no allegation in the original petition in this matter that Petitioners' massage parlor activities were conducted in "private." [See, Appendix A]. The only interest directly advocated by Petitioners, and the only resulting harm alleged by them resulting from the enforcement of the St. Louis County Ordinance is the loss of business (See, Appendix A).)

The law has long recognized prostitution as an evil validly regulated by the police power of the states. See 63 *Am.Jur.2d*, Prostitution, Section 1, 2. The "right of privacy" is not and should not be permitted to provide protection for activities for money such as are engaged in by Petitioners. They are certainly no implicit in the concept of ordered liberty, nor can they be considered fundamental rights.

B. **The notion that the constitutional right of privacy extends to any and all activities between "consenting adults" has been rejected in the Courts.**

Petitioners contend that the right of privacy protected by the Constitution extends to any and all activities between consenting adults (Pet., pp. 16-20). This notion has been summarily rejected in this court and in the vast majority of state courts, and should be rejected here.

Citation is made by Petitioners to a number of state and lower Federal Court decisions in support of their argument. None of

these involve "sex for pay" situations, which is really the question here. Respondents doubt that such encounters may truly be classified as between "consenting adults" as Petitioners' cases set forth.

State v. Lair, 301 A.2d 748 (N.J. 1973), was concerned with a conviction for rape and sodomy. In the course of its opinion, the New Jersey court held that the provisions of the sodomy statute were not applicable to consensual activity between married persons, but that consent would not be a defense to those not married. *Id.* at 753. *Commonwealth v. Balthazar*, 318 N.E. 2d 478 (Mass. 1974), held the Massachusetts Statute prohibiting unnatural and lascivious sexual acts inapplicable to the private, consensual conduct of adults. *Id.* at 481. In *People v. Johnson*, 77 Misc. 2d 889, 355 N.Y.S. 2d 266 (1974), the City Court of Buffalo, New York, held unconstitutional that section of New York's Penal Code which made deviate sexual intercourse a violation of the law, and distinguished between married and unmarried persons. *Id.* at 267. To the same effect see *People v. Rice*, 80 Misc. 2d 511, 363 N.Y.S. 2d 484 (1975). In *State v. Pilcher*, 242 N.W.2d 348 (Ia. 1976), the Iowa Supreme Court, in a 5-4 decision, held that state's laws prohibiting consensual sodomy between adults to be unconstitutional.

These cases, even though factually inapplicable to the case herein, nonetheless represent a decided minority, and numerous other state court decisions have specifically rejected the theory advanced by Petitioners.[1]

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[1] *Carter v. State*, 500 S.W.2d 368 (Ark. 1973); *People v. Roberts*, 64 Calif. Rptr. 70 (Calif. App. 1967); *State v. Crawford*, 478 S.W. 2d 314 (Mo. 1972); *Dixon v. State*, 268 N.E.2d 84 (Ind. 1971); *Miller v. State*, 268 N.E.2d 299 (Ind. 1971); *Hughes v. State*, 14 Md. App. 497, 287 A.2d 299 (1972) cert. den. 409 U.S. 1025; *Warner v. State*, 489 P.2d 526 (Okla. Crim. 1971); *Moore v. State*, 501 P. 2d 529 (Okla. Crim. 1972); *Canfield v. State*, 506 P.2d 987 (Okla. Crim. 1973), app. dism. 414 U.S. 991, reh. den. 414 U.S. 1138; *State v. McCoy*, 337 So. 2d 192 (La. 1976); *Enslin v. North Carolina*, 217 S.E.2d 669 (N.C. 1975), cert. den. 425 U.S. 903, reh. den. 425 U.S. 985.

The case of *Doe v. Commonwealth's Attorney for the City of Richmond*, 403 F. Supp. 1199 (E.D. Va. 1975), aff'd 425 U.S. 901, reh. den. 425 U.S. 985 (1976), appears to set at rest further reliance upon the *Griswold* line of cases as a basis for extending the constitutional right of privacy to all activities between consenting adults. An action was brought by a group of homosexuals for a declaration that the Virginia statute prohibiting the "crime against nature" was unconstitutional. The District Court, as affirmed by this Court, limited the holding of the *Griswold* case to married persons, and did not extend the constitutional right of privacy to other private consensual relationships. *Id.* at 1202, citing Mr. Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 522 (1961). The right of privacy found worthy of constitutional protection in regard to the marital relationship, was not extended to include the homosexual relationship between two consenting adults. Noting part of Mr. Justice Harlan's dissent, the District Court differentiated between marriage and " 'Those who establish intimacies which the law has always forbidden and which can have no claim to social protection.' " 403 F. Supp. at 1201.

It is clear that the holding of the United States Supreme Court in *Griswold*, supra, cannot, has not, and should not be extended to the setting of prostitution.

C. **The cases recognizing First Amendment protection for commercial free speech do not establish such First Amendment protection for Petitioners' activities.**

Petitioners have, in their petition (Pet., p. 16), set forth a number of recent decisions of this court, which have found certain speech protected under the First Amendment, notwithstanding that such speech may be classified as purely commercial speech. *Bigelow v. Virginia*, 421 U.S. 809, 820-821 (1975); *Linmark Associates, Inc. v. Township of Willingboro*, — U.S. —, 97 S.Ct. 1614, 1617 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 760-762 (1976). With respect to these types of cases, it should be observed that Petitioners' activities are not, in the sense of these cases, "speech". The Court has not accepted the view that all manner of conduct may be so labeled whenever a person engaging therein intends thereby to express an idea. *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Conceding that one of a number of constitutional sources for the right of privacy is the First Amendment, *Griswold v. State of Connecticut*, supra, at 484, Petitioners' conduct herein does not claim to express any idea or thought, nor could it do so. Even in *O'Brien*, the draft-card burner claimed he did so "because of his beliefs." 371 U.S. at 369. Even granting Petitioners standing to raise the issue of right of privacy, see, supra, the obvious aim of such activity does not involve any message or communication. Insofar as Petitioners themselves are concerned, their admitted only aim is commercial in nature. Petitioners have cited no authority for classifying their activities as "speech".

In these decisions, the Court's determination was that in matters of regulation of speech, the Court could not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation. *Bigelow v. Virginia*, supra, at 826; *Linmark Associates v. Township of Willingboro*, supra, 97 S.Ct. at 1617. The fact that the speech was commercial in nature did not remove this burden from the Court, for the public's interest in the free flow of information was as vital in the commercial as well as the non commercial area. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, supra, at 762-765. The Court found "no satisfactory distinction between the two kinds of speech," i.e., commercial and non-commercial speech.

The activities in question here are, however, quite distinguishable, i.e., commercial and non-commercial sexual activity.

The State's right to interfere with the purely private decision to bear or not bear a child is limited. *Roe v. Wade*, supra, at 153-154. The other cases cited, supra, Section II-B, involved personal, private decisions. *Carey v. Population Services International*, —U.S.—, 97 S. Ct. 2010 (1977), found that restrictions on the right to sell and have access to contraceptive materials violated the constitutional right of privacy not because there was an independent fundamental right of access to contraceptives, "but because such access is essential to exercise of the constitutionally protected right of decision in matters of child bearing . " 97 S. Ct. at 2018.

Petitioners' activities do not affect the very private, personal decisions, protected from excessive or unreasonable governmental regulations by the constitutional right of privacy. Making these activities commercial in nature creates a very "satisfactory distinction" between them and child bearing and child birth. As Respondents have previously noted, commercial sex has historically been regulated by Federal, State and local governments. The government's interest in public morality is clear. *Paris Adult Theatre I v. Slaton*, supra. And it cannot be argued that Petitioners' activities are essential to the exercise of the constitutionally protected right of decision in matters of child bearing of which *Carey* speaks. Petitioners have certainly argued or demonstrated no public interest in their activities, as was shown in the "commercial free speech" decisions cited by them.

Respondent respectfully suggests that activities conducted in Petitioners' massage parlors for consideration do not come within the protection of the First Amendment, as noted in these cases.

III

Petitioners' Contention That St. Louis County's Ordinance Is Unconstitutionally Overbroad, Is Based Upon Construction of Its Provisions in a Manner Contrary to Settled Rules of Statutory Construction Recognized by This Court; and, Further, the Interpretation of the Ordinance by the Missouri Court of Appeals, St. Louis District, Is Binding Upon the Court.

Petitioners' entire claim of unconstitutional overbreadth is based upon its construction of one subsection of the definition section of the St. Louis County Ordinance. It is contended that such ordinance sweeps too broadly and invades constitutional rights, by bringing within its scope, inter alia, the practice of medicine, nurses, hospital orderlies and baby sitters. This "gross and inexcusable" overbreadth (Pet., p. 24) allegedly violates constitutional prohibitions against "unwarranted presumptions" (Pet., p. 26) and "overbreadth". (Pet., p. 25).

Setting aside for the moment the dubious standing of Petitioners (admittedly operating massage parlors and admittedly performing acts which would be violative of the ordinance if enforced) to raise the rights of doctors, nurses, orderlies, baby sitters, etc.,[2] Respondent submits that Petitioners' isolation of one statutory provision, and its interpretation in an unreasonable and absurd manner, does not raise any meritorious constitutional challenge to St. Louis County Ordinance No. 7546.

This Court, when construing statutes for the purpose of their constitutional validity, will construe enactments to avoid an unreasonable or absurd result, *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966), in accord with the legislative intent. *Foster v. United States*, 303 U.S. 118, 120 (1938). The Court must keep in mind the obvious policy and purpose of the act.

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[2] *U.S. v. Raines*, supra.

Such interpretation requires more than mere concentration upon isolated words, rather, consideration must be given to the whole statute. *Boys Markets, Inc. v. Retail Clerks Union, Local 770,* 398 U.S. 235, 250 (1970); *Kokoszka v. Belford,* 417 U.S. 642, 650 (1974). See, also, *Philbrook v. Glodgett,* 421 U.S. 707, 713 (1975); *United States v. An Article of Drug, etc.,* 397 U.S. 784, 799 (1969); *Richards v. U. S.,* 369 U.S. 1, 11 (1962).

Observing the entire St. Louis County Ordinance, it is clear that such ordinance seeks to prohibit prostitution, i.e. sexual activity of a commercial nature. The definitional section referred to by Petitioners must be read in the light of the entire ordinance, which was obviously not the regulation of doctors, nurses, baby sitters, etc. Interpreting the ordinance in the manner argued by Petitioners is inconsistent with other provisions therein, and with the obvious legislative intent of the St. Louis County Council.

As a general rule of statutory construction, criminal statutes are generally narrowly construed in favor of the accused, and ambiguity must be resolved in favor of lenity. *United States v. Emmons,* 410 U.S. 396, 411 (1973). Yet, contrary to this presumption, Petitioners seek the widest and most broad coverage of this ordinance, attempting to bring within its provisions situations obviously not within its scope. A statute should not be given a broad construction if its validity can be saved by a narrower one. *United States v. Harriss,* 347 U.S. 612, 618 (1954).

The Missouri Court of Appeals, St. Louis District, has determined tht Petitioners' interpretation of the Ordinance is "inconceivable", "unreasonable", "frivolous", "speculative" and "invalid". *Caesar's Health Club, et al., v. St. Louis County,* supra, at 789. As review by the Missouri Supreme Court was denied, this interpretation of the St. Louis County Ordinance represents an interpretation by the highest appellate court of Missouri.

This Court is bound by the interpretation of state enactments by the highest court of that particular state. *Groppi v. Wisconsin,* 400 U.S. 505, 507 (1971); *Eisenstadt v. Baird,* supra, at 442; *Gurley v. Rhoden,* 421 U.S. 200, 208 (1975); *Ward v. Illinois,* — U.S. —, 97 S.Ct. 2085, 2089 (1977).

As stated by this Court in *Wainwright v. Stone,* 414 U.S. 21, 22-23 (1973):

> "For the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation 'we must take the statute as though it read precisely as the highest court of the State has interpreted it . . .' (citations omitted). When a state statute has been construed to forbid identifiable conduct so that 'interpretation by [the state court] puts these words in the statute as definitely as if it had been so amended by the legislature', claims of impermissible vagueness must be judged in that light."

The Missouri Court of Appeals, St. Louis District, has interpreted the ordinance as not including baby sitters, doctors or nurses. The Court of Appeals felt that " 'robust common sense' " would not include those professions within the scope of this Ordinance. 565 S.W.2d at 789.

The Missouri Court of Appeals correctly noted the principle laid down by this Court in *Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973) that where conduct and not merely speech is involved, the alleged overbreadth of a legislative enactment must be not only real but substantial, judged in relation to the statute's legitimate sweep. 565 S.W.2d at 789.

CONCLUSION

For the reasons stated herein, the petition for writ of certiorari should be denied.

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APPENDIX

APPENDIX A

PETITION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Comes now Plaintiffs and for their cause of action for declaratory judgment and injunctive relief state to the Court as follows:

1. Plaintiffs are individual proprietors or duly incorporated businesses authorized to transact business in the State of Missouri and in the County of St. Louis, and are generally engaged in the lawful ownership and operation of massage establishments in the said St. Louis County.

2. The defendant, St. Louis County, is a political subdivision in the State of Missouri, and as such has the authority to enact and enforce the laws of St. Louis County, Missouri.

3. On or about October 10, 1974, the St. Louis County Council enacted a Bill No. 254, Ordinance No. 7273, which added a new chapter 626 to the St. Louis County Revised Ordinances of 1964, as amended, relating to the regulation of massage establishments of St. Louis County. Lawrence K. Roos, the Supervisor of St. Louis County, affixed his signature thereto on the 14th day of October, 1974, and pursuant to law, said ordinance would have become legally enforceable 15 days thereafter or on October 29, 1974. Before this date, however, the Honorable Orville Richardson, St. Louis County Circuit Judge, granted plaintiffs' request for a temporary restraining order in Cause No. 361342 and so said ordinance never became effective.

4. On May 8, 1975, the St. Louis County Council enacted Bill No. 101, Ordinance No. 7470, to repeal and replace Ordinance No. 7273, Bill No. 254. Said Bill also sought to regulate massage establishments in St. Louis County. The Honor-

able Eugene McNary, Supervisor of St. Louis County, affixed his signature thereto on the 8th day of May, 1975, and pursuant to law, said ordinance would have become enforceable 15 days thereafter or on May 24, 1975. Again, in Cause No. 361342 the Honorable Orville Richardson granted plaintiffs' request for a temporary restraining order and so said ordinance never became effective.

5. Thereafter, on July 31, 1975, the St. Louis County Council enacted Bill No. 177, Ordinance No. 7562, relating to the regulation of massage establishments to repeal and replace the above-cited ordinance. This Ordinance is part of Cause No. 361342 still pending before the Honorable Orville Richardson and so not directly involved in this cause.

6. Also on July 31, 1975, the St. Louis County Council enacted Bill No. 178, Ordinance No. 7546 Amending Title VII, Chapter 713, St. Louis County Ordinance 1964, as amended. This Bill was signed by Honorable Eugene McNary, Supervisor of St. Louis County, on August 5, 1975, and would become enforceable at midnight August 20, 1975, if this restraining order is not granted. This Bill relates to the regulation of Prostitution. A copy of said Bill No. 178 is attached hereto as Exhibit A and made a part hereof.*

7. Plaintiffs' establishments engage in the practice of giving massages at the request of the client, which do result in consensual touching of a person's anus or genitals. The massage establishments do not violate any County, State or Federal Law which is in effect at this time. However, these sexual acts will be prohibited under Bill No. 178, Ordinance No. 7546 and so a continuation of plaintiffs' businesses after this ordinance becomes effective can result in the criminal prosecution of plaintiffs and their employees. Further, if this Ordinance becomes effective and plaintiffs close down their businesses to conform with this Ordinance, they will incur great and substantial economic losses.

8. Plaintiffs herein state that said ordinance is unlawful, invalid, and in violation of the Statutes of Missouri, the Constitution of Missouri, and the United States Constitution, in the following respects, to-wit:

(a) Section 713.030 (3) defines "Sexual Conduct". Subsection (c) of this section defines one type of "sexual conduct" that being "sexual contact" as "any touching, manual or otherwise, of the anus or genitals of one person by another." This subsection is fatally defective for four reasons:

(1) Firstly, this section defines "Sexual Contact" in terms of "any touching, manual or otherwise." This language is vague, broad and uncertain resulting in the confusion of interpretation and thereby making said section susceptible of discriminatory enforcement. Reasonable people could differ as to what acts or conduct "manual or otherwise" includes. This definition, then, lacks necessary and appropriate standards and could be arbitrarily enforced, depending on the individual law enforcement officer's interpretation thereof. This section, therefore, violates the Due Process Clause of the Missouri Constitution, Article I, Section 10, and violative of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

(2) Section 713.030 (3) defines "Sexual Contact" in terms of touching "the anus or genitals." Presumably the purpose of this section is to prevent one person from sexually arousing another person by touching an erogenous zone. With this purpose in mind, this section does not achieve its objective as there are several erogenous zones of the body not enumerated herein. If the County can show it is within their authority to prevent stimulation of the erogenous zones, then touching of all erogenous areas should be prohibited including the lips and breasts, not just prohibit those areas that the County Council, for some unexplained and totally irrational reason, finds distasteful. As it stands now, this section is underinclusive and so a violation of

the Due Process Clause of the Missouri Constitution, Article I, Section 10, and is violative of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

(3) This sub-section does not require any intent, but rather declares the act itself unlawful. No standards concerning intent are provided and so even an accidental touching in certain situations would constitute a violation under this section. This lack of adequate standards of intent render this section unconstitutional as a violation of the Due Process Clause of the Missouri Constitution, Article I, Section 10, and the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

(4) Section 713.030 (3) (c) enlarges the ordinary and common law definitions of "prostitution" which has traditionally been defined as "a woman who permits any man who will pay her price to have sexual intercourse with her." It is also defined as ". . . indiscriminate intercourse." (Black's Law Dictionary, Fourth Edition) By defining "prostitution" to include mere touching of the anus or genitals the County Council is overstepping its legislative authority. Any innocent and lawful act (which touching of the anus or genitals is under existing Missouri legislation and judicial opinion) can be labeled "unlawful" at the whim and caprice of the Council. This expanded definition of prostitution, (a word that has become well defined over the last many centuries) is an abuse and invalid exercise of the police powers granted to the Council. As such, it is violative of the Due Process Clause of the Missouri Constitution, Article I, Section 10, and the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

9. Section 713.030 (3) (c) and Section 713.040 are unconstitutional in several respects, to-wit:

(a) The County's prohibition of the above described conduct is violative of plaintiffs' constitutional Right of Privacy. This ordinance imposes criminal sanctions on harmless victimless

sexual relations between consenting adults even when performed in privacy. One's Right to Privacy cannot be infringed upon without a compelling state interest which St. Louis County has failed to demonstrate. The conduct prohibited by this ordinance presents no threat to the public health or safety. Moreover, any crimes that the County feels are ancillarly to this sexual conduct should be prosecuted individually and directly by the appropriate statute or ordinance. Without a showing of a compelling state interest, the attempt of this Ordinance to directly criminalize an act such as touching the genitals or anus of another clearly intrudes upon a constitutionally protected right of adults to engage in private, consensual sexual acts and, so, violates the fundamental right to privacy in violation of the First, Third, Fourth, Fifth and Fourteenth Amendments of the United States Constitution.

(b) These sections are an invalid exercise of the County's police powers. Of course there is nothing unconstitutional about governmental regulation for the public welfare as long as the methods used are consistent with Due Process guarantees. For all of the reasons discussed above, this ordinance infringes upon those guarantees. In addition to the already stated violations, this ordinance is an invalid exercise of police powers as it is unreasonable, arbitrary and capricious, and the means selected have no real or substantial relation to any legitimate governmental purpose. There is nothing valid to be accomplished by making criminal the acts discussed above. This encroachment upon and conflict with the demands of Due Process are a violation of the Missouri Constitution, Article I, Section 10, and the Fourteenth Amendment of the United States Constitution.

(c) These sections are an attempt by the County Council to write a moral code. The Council is, in effect, using the powers of the State (here a political subdivision thereof) to enforce standards which are purely moral and/or religious. It is quite inappropriate for the Council to attempt to control behavior and,

in fact, criminalize that behavior, if it does not endanger or harm legally protected individual and social interests. In this instance the Council is attempting to control behavior that has no substantial significance except as to the morality of the actor. For this reason, the ordinance is invalid as it overreaches any permissible legislative purpose. In addition, it penalizes conduct wholly incapable of equal enforcement as illustrated in several examples given above. For these reasons, the ordinance is violative of First and Fourteenth Amendments of the United States Constitution and Article I, Section 10 of the Missouri Constitution.

(d) These sections are unconstitutional under the doctrine of overbreadth and so violative of the Due Process Clause of the Missouri and United States Constitution. Although the Council here may have a legitimate governmental purpose in controlling or preventing some of the activities constitutionally subject to state regulation, it goes beyond this as it sweeps unnecessarily broadly and thereby invades certain areas of protected freedoms.

(e) Although this ordinance on its face is neutral and does not purport to discriminate against one class of people, the Court must assess the reality of law's impact and consider the background against which the Council passed this ordinance. As stated in allegations 3 and 4 above, the County has twice passed legislation which dealt with the regulation of massage parlors. The practical effect of this legislation, had either ordinance ever been allowed to go into effect, would have been to put massage parlors in the unincorporated areas of St. Louis County out of business. The ordinance under consideration here is the County's third attempt to accomplish this purpose. Although this present ordinance on its face is seemingly neutral, it will, in reality, have an unequal effect and be applied unequally so as to deprive plaintiffs herein of the Equal Protection Rights under the Fourteenth Amendment to the United States Constitution. Not only, then, was the purpose of this ordinance to

deprive plaintiffs of their constitutional rights, but the effect of the ordinance will do likewise. Besides subjecting plaintiffs to criminal prosecution if they continue what has been a lawful business, they will also be deprived of the fundamental right to engage in a legitimate business—a right that is essential to our constitutional right to Due Process. As such this ordinance violates plaintiffs' equal Protection Rights and Due Process Rights under the Missouri Constitution, Article I, Section 10, and the Fourteenth Amendment to the United States Constitution.

10. Plaintiffs further state that the Legislature of Missouri has given constant attention to the criminal aspects of sexual conduct and public morality and has enacted numerous criminal laws relating thereto. The Missouri Legislature has thereby preempted and occupied the field. Therefore, no regulation locally by the St. Louis County Council is lawful or valid in relation thereto. Furthermore, sexual acts which are legal everywhere else would by virtue of this ordinance be illegal here. The modern trend thereabout the County as expressed best in the American Bar Association has been to decriminalize commercial conduct between consenting adults in private.

11. Section 713.030(4) defines "something of Value." The prohibition of certain acts for "something of value" as this term is defined in this section is unconstitutionally broad and vague. By including in this definition words such as "property the County would have to prosecute for prostitution the wife who, in exchange for a mink coat, agrees to bestow her husband with her sexual favors. Certainly the County could not have intended that this ordinance reach the broad group of people and situations who would fall within this provision as it is now written. The vagueness and overbreadth of this provision render it a violation of the Due Process Clause of the Missouri Constitution, Article I, Section 10, and is violative of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

12. Section 713.030(5) defines "Promoting Prostitution" as occurring when "a person knowingly promotes, solicits, compels or encourages a person to engage in prostitution or patronize prostitution." This section is overly broad and vague as it would punish even a suggestion by one person to another that he or she engage in the most harmless of sexual activity. Therefore, the friend who suggested to another that they visit a massage parlor for a "local massage" could be prosecuted under this section for encouraging another to patronize prostitution. The vagueness and overbreadth of this section makes it unconstitutional as a violation of the Due Process Clause of the Missouri Constitution and the Due Process Clause of the Fourtenth Amendment of the United States Constitution.

13. Section 713.030(6) defining "Profiting from Prostitution" is likewise unconstitutional for reasons of vagueness and overbreadth. Under this provision the person who accepts some ball tickets in exchange for fixing up a friend with a date who is certain to engage in "sexual contact" is guilty of "profiting from prostitution." This section is, therefore, a violation of the Due Process Clause of the Missouri Constitution and the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

14. Plaintiffs state that Ordinance No. 7546 will become legally enforceable at midnight on August 20, 1975. Plaintiffs verily believe and have been advised that their respective business establishments, individually or collectively, will become the immediate object of police raids and multiple arrests of owners and their employees on the charge of violating this ordinance. Plaintiffs will suffer substantial money damages and irreparable harm in loss of business trade and good will. Plaintiffs further state that they have, in fact, already suffered pecuniary loss to their business trade by reason of the mere existence of the aforementioned ordinance and its anticipated enforcement.

15. Plaintiffs further state that a fundamental right is affected by the passage of the aformentioned ordinance, this right being

the pursuit of a legitimate business. Said right is guaranteed to all citizens under Article I, Section 2 of the Missouri Constitution, Article I, Section 10; the Due Process Provisions of the Federal Constitution under the Fourtenth Amendment. There exists no compelling governmental interest of St. Louis County requiring the arbitrary and unlawful interference with said fundamental right. Presumably, said ordinance is designed to criminalize certain sexual conduct and its commercial exploitation. No evidence has been presented to the County Council or to this Court of any "sexual intercourse" or "deviate sexual intercourse" as defined by Ordinance No. 7546 existing in plaintiffs' business establishments. There will be no injury to any party should a temporary restraining order be granted pending a final hearing in this matter, and in fact, the interest of the public will be better served by prohibiting the enforcement of said ordinance by the defendants until a final hearing in this matter can be had and the constitutional rights of plaintiffs adjudicated in a Court of Law.

16. Plaintiffs further state that there exists no adequate remedy at law and that the equitable relief herein sought is necessary in order to afford plaintiffs substantial justice and an adequate remedy, and it is necessary that the defendants be enjoined in the matter as hereinafter prayed in order to afford plaintiffs the relief to which they are entitled.

17. This Honorable Court has jurisdiction to grant the necessary relief to the Plaintiffs pursuant to Sections 526.010, 526.020, 526.030, 527.010 and 527.020 of the Statutes of Missouri and the Civil Rules of Procedure, Sections 87.01, 87.02, 92.01 and 92.02 in the St. Louis County Rules of Circuit Court as amended September 1, 1973, Rule 9B.

WHEREFORE, the plaintiffs pray that the Court enter its Order and grant to plaintiffs, individually and collectively, the following relief, to-wit:

1. That the Court enter its Order restraining the defendant, its agents and employees, from enforcing the aforementioned Ordinance No. 7546, 1975, and Bill No. 178, 1975, until a hearing can be had on it and application for temporary injunction prohibiting the enforcement of said ordinance;

2. That a temporary injunction be issued until final hearing can be had in the above matter, prohibiting the enforcement of said ordinance by the defendant.

3. That upon final hearing said injunction be made permanent and defendant, its agents and employees, be forever prohibited from enforcing the aforementioned ordinance or that said ordinance in its entirety be declared unlawful and invalid.

4. And for such other and further relief as to this Honorable Court may seem just and proper in the premises, and that the costs herein in these proceedings be taxed against the defendants herein.

APPENDIX B

RETURN TO ORDER TO SHOW CAUSE AND ANSWER OF DEFENDANT, ST. LOUIS COUNTY

(Filed October 14, 1975)

Comes now defendant and for its Return to the order to show cause heretofore issued and for its answer to Plaintiffs' petition states:

1. Admits the averments in paragraphs 1, 2, 3, 4, 5 and 6 of Plaintiffs' petition.

2. Admits the allegations in paragraph 7 that Plaintiffs' establishments engage in the practice of giving massages at the request of the client which result in consensual touching of a person's anus or genitals, and that these sexual acts will be prohibited under Bill No. 178, Ordinance No. 7546 and so a continuation of Plaintiffs' businesses could result in their criminal prosecution. Defendant denies the allegations that said massage establishments do not violate any County, state or federal law now in effect, and that Plaintiffs will incur "great and substantial economic losses" if they close down their businesses to conform to said ordinances.

3. Defendant denies each and every averment in Paragraphs 8, 9, 10, 11, 12, 13, 15, 16 and 17.

4. Defendant admits the averments in paragraph 14 that Ordinance No. 7546 became legally enforceable August 20, 1975, and further admits that County officials intend to enforce said ordinance. Defendant denies each and every other averment in paragraph 14.

WHEREFORE, Defendant prays to be hence dismissed at Plaintiffs' costs.

APPENDIX C

(Part of Respondent's Trial Court Memorandum)

II

The St. Louis County Ordinance May Properly Regulate Public Moral Conduct.

Plaintiffs' Memorandum (pp. 11-12) accuses St. Louis County of attempting to regulate public morality, and would deny to government that right. What Plaintiffs refer to as "moral legislation" is called a "relic of our religious heritage . . ."

While it is true that the **private** thoughts (and necessarily the moral content thereof) are not subject to governmental regulation, **Stanley v. Georgia,** supra, the subject of regulation in this case is **commercial** sex, solicited for in public places, and in the case of Plaintiffs, conducted in public places. The County Council is not attempting to regulate the moral content of a person's thoughts, but rather a public commercial venture, which the legislature considers to be harmful to the public interest.

Contrary to the assertions of Plaintiffs, no significant Court decision has ever held that "morals" are not a proper subject for regulation. The legislature may regulate conduct with a view toward social order and morality. *Chaplinsky v. New Hampshire,* 315 U.S. 568, 62 S.Ct. 766, 769 (1942).

More than just mere regulation of morality is involved here, however. The legislature is obviously of the opinion that permitting prostitution, in whatever form, in the unincorporated area of St. Louis County, is inimical to the public interest of the citizens therein. Plaintiffs obviously disagree. But the legislature is not required to *prove* by scientific methods that its assumptions concerning the public interest are, indeed, true. As

stated by the court in *Paris Adult Theatre I v. Slaton,* supra, at 2638-2639:

> "The fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional . . .
>
> " 'We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.' "

As recognized by the District of Columbia Court of Appeals in *U.S. v. Moses,* supra, 17 Crim. Law Rep. 2225, there is a legitimate national, state, and community interest in maintaining a *decent* society, and the stemming of commercialized sexual solicitations is an acceptable means of furthering this interest. The Utah Supreme Court recently recognized the importance attached to public morality:

> "It should be realized that a *wholesome moral atmosphere* is just as important to the general health and welfare as are the protection of persons and property . . ." *State v. Phillips,* 18 Crim. Law Rep. 2028 (Utah S.Ct. 1975). (Emphasis added.)

The Federal District Court in Virginia, in upholding that state's anti-sodomy statute, stated:

> "It is enough for upholding the legislation to establish that the conduct (prohibited) is likely to end in a contribution to *moral delinquency." Doe v. Commonwealth's* Atty., 18 Crim. Law Rep. 2167 (D. Va. 1975) (Emphasis added).

Plaintiff's basic point in this section, that morality may not constitutionally be regulated, is simply not supported by authority. The legislature in its wisdom is entitled to conclude that prostitution, and all its by-products, would be harmful to the

public interest, and outlaw such activity. The legislature may believe (even though not provable) that permitting prostitution to exist could lead to other problems, such as increased cases of venereal disease, the influx of organized crime, and the like. Plaintiffs' attack in this section is leveled basically at the legislators' wisdom. As has been stated on numerous occasions, courts do not sit to pass judgment on such wisdom.